CLOSED

FILED
OCT 28 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BEVERLY CROWLEY, et al.,

Plaintiffs,

vs.

ROBERT TILTON, et al.,

Defendants.

No. 92-C-687-E

EOD 10/30/92

O R D E R

This action was originally brought in Tulsa County District Court where Plaintiffs sought damages for conspiracy to solicit funds under false pretenses, for negligent and intentional infliction of emotional distress and for fraud. The matter was subsequently removed to this Court pursuant to 28 U.S.C. §1441 et seq. It is now before this Court upon Plaintiff's Motion to Remand (docket #9). Plaintiffs assert that removal was improper because there is no jurisdictional basis upon which this case could have been originally brought in this Court. There is no dispute that diversity is unavailable; therefore jurisdiction cannot be premised upon 28 U.S.C. §1332. Plaintiffs contend that no federal issue is presented by the action; thus jurisdiction based upon 28 U.S.C. §1331 is also precluded. Defendants respond that their First Amendment rights are implicated by Plaintiff's allegations; therefore this court has federal question jurisdiction.

It is settled that Defendants have the burden of establishing jurisdiction and that in doubtful cases the matter should be remanded. See e.g. People of State of Ill. v. Kerr-McGee Chemical

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Corp., 677 F.2d 571 (7th Cir. 1982), cert denied 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618. Section 1331, Title 28 of the United States Code provides that [t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." "[F]or both removal and original jurisdiction, the federal question must appear on the face of the complaint unaided by the answer and the petition for removal." Diaz v. Swiss Chalet, 525 F.Supp. 247 (D. Puerto Rico, 1981) citing Gully v. First National Bank, 299 U.S. 109, 113, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936); La Chemise Lacoste v. Alligator Company, 506 F.2d 339 (3rd Cir. 1974) cert. denied, 421 U.S. 937, 95 S.Ct. 1666, 44 L.Ed.2d 94, reh. den., 421 U.S. 1006, 95 S.Ct. 2408, 44 L.Ed.2d 674 (1975). Thus, the complaint must assert a claim premised upon federal law - a right or immunity created by the Constitution or laws of the United States - and that claim must be essential to Plaintiffs' cause of action. Put another way, if Plaintiffs' "well-pleaded complaint" raises a substantial question of federal law which is essential to their claim, federal courts have original jurisdiction. See e.g., Pruitt v. Carpenters' Local Union No. 225 of United Broth of Carpenters and Joiners of America, 893 F.2d 1216 (11th Cir. 1990). However, lest form negate substance, the courts have found that lack of reference to federal law in the words of the complaint does not preclude further inquiry to determine whether the real nature of plaintiffs' claim is federal. See e.g., Jones v. General Tire & Rubber Co., 541 F.2d 660 (1976).

Defendants invite the Court to go beyond the four corners of Plaintiffs' complaint and employ that approach in the instant case. They cite four cases in support of their position that Plaintiffs' claims are federal in nature: Sweeney v. Abramovitz, 449 F.Supp. 213, 215 (D.Conn. 1978); Paul v. Watchtower Bible and Tract Society of New York, 819 F.2d 875 (9th Cir. 1987); Board of County Commissioners v. Shrayer, 662 F.Supp. 1542 (D. Colo. 1987); and United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882 (1944). The Court has reviewed the cases cited and finds them inapposite.

In Sweeney, Michael Sweeney, a police officer arrested Dr. Robert Abramoritz who, in turn, sued Officer Sweeney in federal court under 42 U.S.C. §1983. In that case, Officer Sweeney was exonerated and he, then, sued Dr. Abramovitz in state court for malicious prosecution because, he alleged, the good doctor's suit "'was commenced and prosecuted ... without probable cause ...'" Id. at 214. The Court found that "without probable cause" could only mean without probable cause to believe there existed a valid cause of action under 42 U.S.C. §1983"; therefore federal law was essential to and implicit in Plaintiffs' claim. The Court applied Justice Holmes' axiom that "'a suit arises under the law that creates the action.'" Therefore, because Plaintiff's claim relied on federal law, the court had original jurisdiction for purposes of 28 U.S.C. §1441. By contrast, in the instant case the Defendants repeatedly confuse their defense which - it may be anticipated - will rely on the First Amendment (assuredly a federal right) with Plaintiffs' claim for fraud and infliction of emotional distress

(indubitably, rights arising under state statutes and common law).

In Shroyer, the Board of County Commissioners sought to silence Defendant's criticism of its expenditures by filing a declaratory judgment in state court. Defendant removed on the basis of his First Amendment right to protected free speech. The Board challenged jurisdiction under the well-pleaded complaint rule. The Court found the Board's complaint to pose "a perfect example" of artful pleading which manages to avoid on its face the true import of its claim. The Court in the instant case without intending to be pejorative finds that Plaintiff's case is not so artfully pled. In Shroyer, Plaintiff sought to achieve through the backdoor of declaratory relief what it could not achieve through the front door of an injunction: "to muzzle defendant by haling him into court and requiring him to defend a position he asserts in public." Id. at 1544. In the instant case Plaintiffs seek damages for past behavior by the Defendants which they allege to have been fraudulent. In any case, the Court in Shroyer found that the Plaintiffs ran aground on the perilous shores of Scylla by failing to state a case or controversy. Id. Thus, Plaintiff's petition for declaratory judgment amounted to a request for an advisory opinion and the case is distinguishable on this basis as well.

Ballard and Paul were found to impermissably challenge religious belief and free exercise, respectively, and are therefore distinguishable. Ballard was a criminal prosecution for mail fraud premised in part, upon the veracity of defendants' religious beliefs. In Ballard, the trial court expressly excluded from the

jury's consideration the truth or falsity of the defendants' professed beliefs. In so doing he withheld from the jury portions of the charges challenging Defendants' religious doctrines or beliefs. The Court of Appeals reversed averring that the allegations relating to the veracity of those doctrines and beliefs should have been submitted to the jury. The Supreme Court reversed on First Amendment grounds. In Ballard, the defendants were initially charged with violation of the federal criminal code. The case is conclusively distinguishable on that ground as well: this is a case brought under state law.

In Paul, Plaintiff's claim expressly challenged Defendant's practice of "shunning". The case explicitly raised the "free exercise" issue and can be distinguished from the instant case on that basis. The instant case challenges not Defendants' religious practices but their alleged failure to act as they promised.

Thus, it appears to the Court that Defendants' reliance on the cases cited is misplaced. The Court has considered the entire record herein and is of the view that the federal issues are Defendants', not Plaintiffs'. Indeed, the Court concludes that Plaintiffs could not have brought the case in federal court originally under the rubric of federal question jurisdiction because their claims and remedies lie entirely under state law. This is not to say that Defendants will not raise federal issues in the case - most assuredly they will. But where the gravamen of the suit arises entirely under state law, "[t]he fact that there are federal questions which lurk in the wings is, without more,

insufficient grounds for removal, for indeed every question of law will ultimately present a 'federal question' if one delves deeply enough." State of Tennessee ex rel. Davis v. Market street News, 357 F.Supp. 74, 79 (1973). The prescribed analysis under §1441 et seq. does not require the Court to engage in reductio ad absurdum. It is enough to consider the nature of Plaintiff's claim and to inquire whether the right claimed arises from state or federal law. The Court need not, should not, anticipate defenses. See e.g., Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir. 1982) cert. denied, 459 U.S. 970, 103 S.Ct. 300, 74 L.Ed.2d 281 (1982)(While "navigability" is a federal question, issue of title to submerged lands pursuant to "equal footing doctrine" which rested on interpretation of state law did not raise a federal question merely because the issue of navigability was involved in reaching a determination.)

Finding that only anticipated defenses implicate federal questions the Court concludes that it lacks subject-matter jurisdiction in this case; therefore Plaintiffs' Motion to Remand should be granted.

It is so ORDERED this 27th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RCB BANK, successor by merger to Bank of Oklahoma-Claremore,

Plaintiff,

vs.

R.B. MANTON, INC. d/b/a Precision Tubulars; R.B. MANTON a/k/a Robert B. Manton, individually; VERDIGRIS VALLEY ECONOMIC DEVELOPMENT CORPORATION; WASHINGTON COUNTY TRUST AUTHORITY; STIFFLEMIER PIPE COMPANY; REDWING SERVICE & SUPPLY COMPANY; HAMILTON METALS, INC.; BBL CO.; FIRST METALS, INC. and FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants.

Case No. 92-C-191 B

ORDER

This Court, having reviewed the Stipulation of Dismissal filed herein by Defendant Federal Deposit Insurance Corporation, in its corporate capacity ("FDIC"), and Defendant BBL Co., finds that the Answer, Counterclaim and Cross-claim of Federal Deposit Insurance Corporation (the "Cross-claim") filed herein by the FDIC should be dismissed with prejudice to the refiling of the same insofar and only insofar as it relates to Defendant BBL Co.

IT IS THEREFORE ORDERED that the Cross-claim filed herein by the FDIC is dismissed with prejudice to the refiling of the same insofar and only insofar as it relates

to Defendant BBL Co. The Cross-claim is not hereby dismissed as against the Plaintiff, RCB Bank, or any defendants other than BBL Co.

IT IS FURTHER ORDERED that the parties shall bear their respective costs, expenses and attorneys' fees.

IT IS SO ORDERED this 27 day of Oct., 1992.

UNITED STATES DISTRICT JUDGE

Approved:

James Vogt, OBA #9243
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Attorney for Federal Deposit Insurance Corporation

W. Kyle Tresch, OBA #13789

- Of the Firm -

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(918) 592-9800

Attorneys for BBL Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES F. QUINLAN,

Plaintiff,

vs.

KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.,

Defendant.

Case No. 90-C-295-B

O R D E R

This matter comes on for consideration of Plaintiff James F. Quinlan's (Quinlan) Application For Allowance Of Attorney's Fee, pursuant to 12 O.S. §936, based upon Quinlan's status as a prevailing party as a result of a jury verdict for damages on Quinlan's second and third causes of action herein.

The jury returned a verdict against the Defendant Koch Oil Company (Koch) in the amount of $44,536.55 actual damages plus punitive damage in the amount of $244,633.04. The Court, by Order entered October 2, 1992, reduced the punitive damage award to the amount of the actual damages, to-wit: $44,536.55, a remittitur in the amount of $200,126.49.

12 O.S. §936 provides as follows:

> "In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to(sic) the

> action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

Quinlan argues the jury verdict was based upon a finding that Koch breached both an implied contractual duty to pay Quinlan his suspended funds and a fiduciary duty to notify Quinlan that Koch was requiring Quinlan to sign a division order before making payment. Quinlan is correct that the Court determined in earlier orders that at least an implied contract to pay existed between Koch and Quinlan. However, this duty was satisfied when Koch paid and Quinlan accepted the sum of $166,608.58 in payment of the suspended funds prior to the institution of this action. Thereafter the issues remaining were Koch's statutory obligation to pay interest on such suspended funds and the amount thereof, and Koch's breach of a fiduciary duty to make reasonable efforts to inform Quinlan that it, Koch, was withholding oil royalties for some certain specified reason. Only the fiduciary duty breach issue was determined by the jury. Koch states §936 is therefore inapplicable.

Koch makes the further point that this suit was brought by attorney Sam Allen, IV (Allen IV) pursuant to the terms of an Agreement And Assignment with International Searchers, Inc. (Searchers), dated June 15, 1988, signed by Quinlan July 31, 1988. Koch avers that under the Agreement, Quinlan authorized Searchers to hire counsel to pursue Quinlan's claim for the funds withheld by Koch. Koch further argues the Agreement specifically states that the counsel chosen by Searchers to pursue Quinlan's claim was authorized to "* * * pursue any legal action in any court or before

any administrative agency for the purpose of recovery, expediting or maximizing the recover of any funds to which the Principal (Quinlan) may be entitled. It is understood that the Agent (Searchers) shall pay all court costs, legal fees, and/or legal expenses incurred, and that in no event shall the Principal be liable for said amounts * * *". Koch points to Allen's time sheet as an obvious indicator of Allen's close involvement with Searchers.[1] Koch's position is that since Plaintiff is not obligated to pay an attorney's fee for representation in this matter he is therefore not entitled to recover any attorney's fees from it.

Allen's reply is that representation in this lawsuit was, and is, that his law firm would represent Plaintiff in pursuing all causes of action based on a 1/3 contingency fee arrangement; that "Plaintiff is obligated to pay said law firm 1/3 of all monies recovered from Koch based upon the judgment obtained in the case at bar."[2]

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[1] The Court notes Allen's time sheet reflects several contacts with Steve and Mark Snead, whom Koch identifies as the owners and officers of Searchers, before any charge item involving Quinlan, the presumably first matter being a letter to Quinlan dated January 8, 1990.

[2] While not an issue in this case, the Court questions whether Searchers would be entitled to any part of the damages recovered by Quinlan since, under the Agreement, it appears Searchers is authorized to collect and share in "any and all funds being held to which the principal may be entitled." In the Court's view a serious question may exist whether Searchers contract rights are limited to the suspended funds, plus interest, but perhaps not include damages for breaches of duties owed Quinlan by Koch. Further, Quinlan may indeed possess an equitable off-set or recoupment claim against Searchers' finders fee, or at least in part, in the event he remains obligated on the Allen contingency fee contract for

The Court concludes Quinlan is not entitled to attorneys fees under 12 O.S. §936 because it is not applicable herein. The Court therefore denies Plaintiff's Application For Allowance Of Attorney's Fee.

IT IS SO ORDERED this 28th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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services contractually to have been provided by Searchers through counsel of its choice. Perhaps Searchers owes for legal fees and expenses incurred in recovering the "funds being held" and Quinlan's 1/3rd contingency attorney fee obligation applies only to the "damages" over and above the "funds being held".

CLOSED

OCT DOCKET
OCT 30 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY, an Oklahoma trust company, also d/b/a Western Trust and Savings Company,

Debtor.

R. DOBIE LANGENKAMP, Successor Trustee,

Plaintiff-Appellee,

vs.

JAMES A. RUSY a/k/a J. A. RUSY and MARCILLE RUSY,

Defendant-Appellants.

Case No. 84-01461-W
(Chapter 11)

FILED

OCT 29 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Adversary No. 86-355-C

Dist. Ct. No. 92-C-625-E

O R D E R

Comes now before the Court for its consideration, the above-styled parties' stipulation of dismissal, pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc. After review of said Stipulation, the Court finds said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 28th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

15

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 30 1992

IN RE:	)	
	)	Case No. 84-01461-W
REPUBLIC TRUST & SAVINGS COMPANY, an Oklahoma trust company, also d/b/a Western Trust and Savings Company,	)	(Chapter 11)
	)	
Debtor.	)	
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Adversary No. 86-443-C
	)	
REBA A. GIBSON a/k/a REBA GIBSON and MAXINE GRACE,	)	
	)	
Defendant-Appellants.	)	Dist. Ct. No. 92-C-629-E

FILED
OCT 29 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Comes now before the Court for its consideration the above-styled parties' Stipulation of Dismissal pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc. After review, the Court finds said Stipulation of Dismissal is hereby granted.

ORDERED this 29th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC TRUST & SAVINGS COMPANY, an Oklahoma trust company, also d/b/a Western Trust and Savings Company,	Case No. 84-01461-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff-Appellee,	
vs.	Adversary No. 86-422-C
MARY L. WHITSON,	
Defendant-Appellant.	Dist. Ct. No. 92-C-627-E

O R D E R

Comes now before the Court for its consideration, the above-styled parties' stipulation of dismissal, pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc. After review of said Stipulation, the Court finds said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 28th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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JHP/kgh

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OFELIO PEREZ,

Plaintiff,

vs.

ROBERT LEWIS SHORT, JR., an individual; ROGER COOPER dba COOPER TRANSPORTATION COMPANY; SHELTER GENERAL INSURANCE COMPANY, a corporation; and, SHELTER MUTUAL INSURANCE COMPANY, a corporation,

Defendants,

HOUSTON GENERAL INSURANCE CO.,

Intervenor.

Case No. 91-C-563-B
Consolidated Case No. 91-C-565-B

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties to the above-entitled action and do hereby agree to this Stipulation of Dismissal With Prejudice in this matter. The parties herein agree to incur all respective costs and fees associated with this action.

WHEREFORE, premises considered, all parties do hereby agree to this Stipulation of Dismissal With Prejudice in the above-entitled action.

GREG HAUBRICH,
Attorney for Plaintiff

MARYLINN G. MOLES/JOSEPH H. PAULK,
Attorney for Defendant

STEPHEN C. WILKERSON,
Attorney for Intervenor

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F.E. BUCK COOK,)
)
Plaintiff,)
)
v.) 91-C-929-B
)
CRAIG CORGAN, et al.,)
)
Defendants.)

ORDER

This order pertains to Defendant Corgan's Motion to Dismiss (Docket #5)[1] and Plaintiff's Traverse to Motion to Dismiss (Docket #8).

Plaintiff alleges that his Fourteenth Amendment rights have been violated by Craig Corgan ("Corgan"), District Attorney for Washington County, who has refused to file criminal charges against Plaintiff's sister and brother-in-law. Plaintiff alleges that he requested several times that criminal charges be filed, but the District Attorney's office failed to prosecute. This allegation stems from inactions taken by Corgan in his official capacity as District Attorney.

Prosecutors are entitled to absolute immunity from suits for civil damages under §1983 when such suits are predicated upon the prosecutor's performance of functions in "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

The Tenth Circuit Court of Appeals held that the decision of a prosecutor not to file criminal charges is within the set of core functions which is protected by absolute

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

immunity. Dohaish v. Tooley, 670 F.2d 934, 938 (10th Cir.), cert. denied, 459 U.S. 826 (1982) (emphasis added). The purpose of this absolute immunity is to guarantee the prosecutor unlimited independence in the discharge of his duties. Id. at 938.

Defendant Corgan's Motion to Dismiss (Docket #5) is granted.

Dated this 17 day of Oct, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 29 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First Bank & Trust Co., Booker, Texas,

Plaintiff,

vs.

KENNETH ADAMS, an individual,

Defendant.

No. 91-C-490-E

ENTERED ON DOCKET
DATE OCT 30 1992

ORDER AND JUDGMENT

UPON CONSIDERATION OF the unopposed stipulation of dismissal filed by the Plaintiff Federal Deposit Insurance Corporation, the Court hereby orders that the Plaintiff's claims in this cause and this action are dismissed without prejudice to refiling and that the parties will pay their own costs relating thereto.

SO ORDERED AND ADJUDGED this 28th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

23

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

L. S. STARRETT COMPANY, a Massachusetts corporation,

Plaintiff,

vs.

REX TAYLOR d/b/a TAYLOR PRECISION MANUFACTURING COMPANY,

Defendant.

Case No. 90-C-614-E

JUDGMENT FOR ATTORNEYS FEES

Upon the Application for Attorneys Fees filed by the Plaintiff and the Objection thereto filed by the Defendant,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff L.S. Starrett Company have and recover of the Defendant Rex Taylor d/b/a Taylor Precision Manufacturing Company, judgment for attorneys fees in the sum of $30,744.25, plus post-judgment interest thereon at the rate of 3.13% per annum from this date, until paid in full.

Dated this 28 day of October, 1992.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

APPROVED AS TO FORM:

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Attorneys for Plaintiff, L.S. Starrett Company

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Attorneys for Defendant Rex Taylor

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ERVIN W. HAWKINS, JR.,)
)
Plaintiff,)
)
v.) 92-C-305-E
)
RON CHAMPION, et al,)
)
Defendants.)

ORDER

Now before this Court is Respondents' Motion To Dismiss. Petitioner Ervin W. Hawkins filed a habeas petition on April 13, 1992. Hawkins claims several reasons as to why he should be freed, including the assertion that he was sexually impotent, and, therefore, could not have committed the rape and sodomy crimes for which he was convicted.

Respondents, however, argue that Hawkins' claims are procedurally defaulted because he failed to file a direct appeal in state court. The issues in this case are: (1) Whether the State relied on independent and adequate state procedural grounds in finding a procedural default on the part of Hawkins; (2) If the State properly applied the procedural bar, has Hawkins shown cause for his default and prejudice as a result; and, (3) If Hawkins has failed to meet the cause-and-prejudice test, can he show that his circumstances constitute a fundamental miscarriage of justice?

For the reasons discussed below, this Court finds that Respondents' Motion To Dismiss is granted as Hawkins' habeas Petition is without merit.

I. Summary of Facts/Procedural History

Hawkins was charged for the rape and sodomy of his 14-year-old stepdaughter, which allegedly took place in January of 1986. On May 10, 1986, Hawkins pled guilty to charges of three counts of First Degree Rape, one count of Causing a Minor To Participate in Lewd Photographs, and one count of Forcible Sodomy.

Pursuant to his plea, Hawkins was sentenced to 30 years each on the first four counts and 20 years on the sodomy count. Prior to entry of the plea, the following exchange took place between the sentencing Judge and Hawkins:

> **Judge: Sir, the remaining three counts have been, by the State, stricken and it is to this Information and those five counts that your attorney indicates you wish to enter a plea of guilty and waive your right to a trial either to the Court or a jury. Is that your desire?**
>
> Hawkins: My desire?
>
> Judge: Do you have any doubts about that, sir?
>
> Hawkins: No.
>
> Judge: Do you understand, sir, that you have the right to a jury trial in this case?
>
> Hawkins: Yes
>
> Judge: Do you understand, sir, that you have the right to cross-examine witnesses against you and to call witnesses in your own behalf?
>
> Hawkins: Yes.
>
> Judge: You understand, Sir, that you cannot be compelled to testify against yourself in this case?
>
> Hawkins: Do you understand you are presumed to be innocent and the State must prove all the material allegations of this charge in all five

Counts reasonable doubt or your will not be convicted?

Hawkins: Yes

Judge: You understand, sir, that by waiving your jury trial and non-jury trial and pleading guilty, you are giving up all of these rights?

Hawkins: Yes.

Judge: Are you doing so freely and voluntarily?

Hawkins: Yes.

Hawkins also told the judge he was satisfied with his representation and that he did not wish to appeal his sentence. Hawkins subsequently did not file a direct appeal.

On November 7, 1991 -- some five years after his guilty plea -- Hawkins asserted 12 claims in an Application For Post-Conviction Relief. The state court found no merit in Hawkins' ineffective assistance of counsel claim, and it declined to examine the other 11 claims on the merits because Hawkins failed to file a timely direct appeal.[1] The Oklahoma Court of Criminal Appeals affirmed the sentence and Hawkins' entry of a plea of guilty, and the trial court's subsequent denial of post-conviction relief. Hawkins later filed the instant petition.

II. Legal Analysis

The first issue is whether this Court is barred from examining the merits of Hawkins'

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[1] *Hawkins alleged the following errors in his post-conviction application: (1) He was denied his right of appeal due to ineffective assistance of counsel; (2) Plea bargains are unconstitutional under Oklahoma law; (3) He was not afforded the benefits of his plea bargain; (4) The trial court failed to inform petitioner of his right to a pre-sentence investigation and report; (4) The trial court did not elicit a factual basis for the plea; (5) That police officers conducted an unlawful search; (6) The search warrant improperly authorized night service; (7) The search warrant was a general warrant prohibited by the United States and Oklahoma Constitutions; (8) {etotopmer was denied due process; (9) Petitioner had discovered new evidence; (10) Petitioner's attorney was ineffective at the time of the plea bargain; and (11) an accumulation of errors denied him a fair proceeding and due process of law.*

habeas claims because of a state procedural default. The rule is:

> **In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.** *See Coleman v. Thompson,* 501 U.S. ____, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

The first question is whether the state court relied on an independent and adequate state procedural ground when applying its procedural bar. Following is an excerpt from the Oklahoma Court of Criminal Appeals in the instant matter:

> **The District Court further found that Petitioner was advised of the right to appeal, yet he took no steps to attempt or perfect a timely direct appeal, nor has Petitioner offered any reason for his failure to file a timely direct appeal. Therefore, the District Court found that Petitioner has waived the remaining propositions of error and denied his application for post-conviction relief.** *Order Affirming Denial Of Post-Conviction Relief, Attachment F, Attachments to Petitioner's Brief.*

The state court's decision plainly indicates reliance upon an independent and adequate state ground. Nothing in either the trial court's order denying the Application for Post-Conviction Relief, or, the Oklahoma Court of Criminal Appeals' Order discusses the merits of the majority of Hawkins' 12 claims. Instead, the state court only addressed the ineffective assistance of counsel claim on the merits, and simply declined to review the other claims. Therefore, unless Hawkins can show cause-and-prejudice or meet the fundamental miscarriage of justice exception, this Court will not examine the merits of his habeas claims. *See, Gilbert v. Scott, 941 F.1 1065 (10th Cir. 1991).*

A. Has Hawkins Made A Showing of Cause And Prejudice?

Hawkins' 27-page legal argument is unclear. However, his argument as to why he

has shown cause-and-prejudice can be grouped into the following six categories: (1) Intervening or subsequent change of law; (2) Fundamental error; (3) Newly discovered evidence; (4) "Fundamental error rule"; (5) State must provide a corrective judicial process, and (6) ineffective assistance of counsel. Numbers 2,3 and 5 do not merit discussion.[2]

Of the remaining issues, Hawkins first contends that *Baker v. Kaiser* is a change of law that constitutes cause for his procedural default.[3] This Court disagrees. The issue in *Baker* was whether a *pro se* petitioner planning to appeal was made aware of the dangers of self-representation. The case also re-enforced the principle that a defendant had a right to counsel in the 10 days after his conviction.

The facts and issue here is different. Unlike *Baker*, Hawkins plead guilty and waived his right to an appeal. Also, unlike *Baker*, neither his attorney nor he indicated to the trial court that he wanted to appeal. Hawkins' claims focus on whether he was denied ineffective assistance of counsel at the time of his guilty plea; consequently this does not put him into circumstances akin to those discussed in *Baker.* Accordingly, Hawkins has failed to show any intervening or subsequent change of law that would constitute cause, much less prejudice.

The second alleged "cause" for the default is what Hawkins claims was "newly discovered evidence" about his own sexual impotence at the time of the rape and sodomy. Under Oklahoma law, newly discovered evidence must be such that it could not reasonably

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[2] *In what Hawkins describes as "fundamental error", "fundamental error rule" and "state must provide a corrective judicial process", he appears to be attacking how the state applied the procedural bar. As mentioned, this Court has found the state properly applied its procedural bar. As a result, these issues do not merit further discussion and, in any case, are without merit concerning either the cause-and-prejudice test or whether his case constitutes a fundamental miscarriage of justice.*

[3] *929 F.2d 1495 (10th Cir. 1991)*

have been discovered prior to trial. *Hale v. State*, 807 P.2d 264, 269 (Okl.Cr. 1991). By Hawkins' own admissions, the evidence does not meet that standard.

In this case, Hawkins admits that both he and his attorney knew that he was suffering from impotency problems. Hawkins writes in a May 13, 1991 letter to his attorney,

> After my mom told you of these facts [about his impotence], you asked me why I hadn't told you. I answered: "I don't know, I guess it was out of silly human pride." The last five and one-half years have taught me that kind of pride is indeed silly. I only wish to prove now, what should have been proven then; that I did not, and could not have committed the crime charged against me.

The fact that Hawkins and his attorney knew of the alleged sexual impotence problem prevents it from being described as "newly discovered evidence". Evidence submitted by Hawkins shows that he and his wife knew, prior to January of 1986, that he had impotency problems. As a result, the defense of impotence could have been reasonably discovered prior to entry of Hawkins' guilty plea. It does not, therefore, constitute cause for a procedural default.

Finally, Hawkins maintains that the incompetence of his attorney was the "cause" for his procedural default. The standard for examining such ineffective assistance of counsel claims is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard was later applied to cases, such as this, involving ineffective assistance claims by defendants who voluntarily plead guilty:

> Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases...[The second requirement requires the defendant to] show that there is a reasonable probability that, but for

counsel's errors, he would have not pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 369-370, 88 L.Ed.2d 203 (1985).*[4]

Under the first prong, Hawkins -- as the convicted defendant making an ineffective assistance claim -- must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 104 S.Ct. at 2066. Hawkins lists five (5) reasons why he believes his counsel was ineffective:

1. His attorney did not fully explain or inform him of his right to appeal or the procedures used to plead guilty.

2. Counsel did not use evidence that suggested Hawkins' impotence or did he further investigate the issue.[5]

3. Counsel never informed Hawkins of the fact that Hawkins was impotent.

4. Counsel was not familiar with all of the facts and/or law in this case at the time of the guilty plea.

5. Counsel did not conduct any inquiry into the facts of case.

Given the foregoing allegations, this Court must determine whether, "in light of all the circumstances", the identified acts or omissions were outside the wide range of professional competent assistance." *Id.*

Upon review, Hawkins has not met his burden in his charge that counsel failed to fully inform him about the consequences of pleading guilty. Beyond his general allegation, which carries little weight, no specific evidence has been presented to the Court. In

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[4] *When applying this test, the Supreme Court cautions court to avoid hindsight and to "evaluate the conduct from counsel's perspective at the time." Strickland, 104 S.Ct. at 2065. A court must indulge a "strong presumption that counsel's conduct" is constitutionally competent.*

[5] *Writes Hawkins: "Mr. Werner [his counsel] knew about Petitioner's "Problem" of impotence when he was hired to be Petitioner's counsel; yet he failed to properly investigate the claim; and also chose not even to inform the Petitioner that he was in possession of this information, that if used would have at the very least shoen [sic] reasonable doubt." Plaintiff's Response at page 23. Also, Affidavits from Maudie Hawkins states that counsel decided not to "check" Petitioner for impotency because of the expense. See, Attachment K-4 to Petitioner's Response.*

addition, the Transcript of the exchange between the state judge and Hawkins is evidence that Hawkins understood the ramifications of his plea.[6] Hawkins also said he was satisfied with his counsel's representation. Therefore, the Court finds that Hawkins' allegation of ineffective assistance of counsel, as regards this claim is without merit.

Hawkins' other allegations of ineffective assistance of counsel focus on his so-called defense of impotence. Hawkins' argument that impotency is a all-encompassing defense to rape is flawed.[7] Oklahoma Statute Tit 21 §1113 states that "any sexual penetration, however slight, is sufficient to complete the crime." Other courts also have found that rape can still take place, despite a defendant's impotence. *See, generally, Missouri v. Ball,* 733 S.W.2d 499, 501 (Mo. App. 1987)(Evidence indicated that impotent condition does not preclude man's ability to penetrate the victim's vagina).

Even assuming *arguendo* that impotency is an all-encompassing defense for Hawkins, he has pointed to no medical evidence that proves he was indeed impotent in January of 1986 when police say he raped his step-daughter. The affidavits of family members simply submitted by Hawkins state that his wife told them of sexual problems; the letters do not discuss either the degree or type of impotency Hawkins allegedly had. He submits medical reports that primarily discuss his diabetic condition, but none of the evidence specifically states that he was sexually impotent at the time the crimes were committed.

Realizing the sparse evidence presented at this time -- some six years after the guilty

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[6] *A defendant's statements at a plea hearing "should be regarded as conclusive [as to truth and accuracy] in the absence of a believable, valid reason justifying a departure from the apparent truth" of those statements. U.S. v. Estrada, 849 F.2d 1304, 1306 (10th Cir. 1988), quoting Hedman v. United States, 527 F.2d 20, 22 (10th Cir. 1975). In this case, Hawkins' contentions regarding this issue are unsupported by specifics. Furthermore, Hawkins has not shown his plea to be involuntary. Laycock v. State, 880 F.2d 1184 (10th Cir. 1989).*

[7] *Hawkins writes that a jury would have found him "not guilty due to the State's failure to present evidence of his guilty beyond a reasonable doubt" because he was "physically incapable" of committing the rape. Petitioner's Brief at page 16.*

plea -- this Court cannot conclude that Hawkins' counsel rendered ineffective assistance at the time Hawkins plead guilty. Perhaps, with the benefit of hindsight, Hawkins' counsel could have inquired further into the "impotence defense" and, arguably, Hawkins could have taken the case to trial. But, viewed within the parameters of *Strickland*, this Court finds that Hawkins has not shown that his counsel's conduct was outside the wide range of competence demanded by attorneys in criminal defense cases.

B. Would A Fundamental Miscarriage of Justice Occur If This Court Does Not Look At The Merits Of Hawkins' Federal Habeas Petition?

Cases involving a fundamental miscarriage of justice "**are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime.**" *McClesky v. Zant,* 111 S.Ct. 1454, 1470 (1991).

As discussed above, Hawkins has presented no medical evidence that shows he was sexually impotent at the time of the crimes. The crux of what he does submit is found within affidavits from family members who say his wife at the time told them of Hawkins' impotence. [8] He submits medical reports discussing his diabetic condition, but none of those reports specifically address impotency. Therefore, this Court finds no fundamental miscarriage of justice exists, and Respondent's Motion to Dismiss is **GRANTED.**

SO ORDERED THIS 28th day of October, 1992.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[8] *An example of the affidavits is one written by Hawkins' sister, Phyllis Campbell. Ms. Campbell states that Hawkins' ex-wife, Judy, told her that Hawkins was "totally impotent" prior to the rape and sodomy.* Attachment K to Petitioner's Brief.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BARRON MOORE,)
)
Petitioner,)
)
v.) 92-C-346-B
)
RON CHAMPION)
)
Respondent.)

ORDER

This order pertains to petitioner's Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #4)[1], respondent's Motion to Dismiss (#5), and Petitioner's Response to Respondent's Motion to Dismiss (#7).

Petitioner pled guilty in Oklahoma County District Court, Case No. CRF-90-3149, to the crime of robbery with a dangerous weapon after former conviction of two or more felonies ("AFCF"). Pursuant to a plea bargain, he was sentenced to a twenty-five (25) year sentence to run concurrently with a sentence from a conviction in Arkansas. The former felony convictions used to augment the charges were, according to petitioner, three felony convictions from Oklahoma and Johnston Counties.

Petitioner filed an application for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq. This was denied on March 11, 1992. That denial was not appealed to the Oklahoma Court of Criminal Appeals. Petitioner then filed this action seeking relief from the sentence imposed. He does not seek relief from the underlying conviction.

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[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Petitioner states that there are three grounds for his petition: 1) there is either an absence of available state post-conviction corrective judicial process or the existence of circumstances rendering such process ineffective to protect his rights to remedy federal constitutional defects in his criminal prosecution; 2) his present sentence was improperly enhanced by prior convictions obtained against him as a result of involuntary and uninformed pleas of guilty; and 3) he received ineffective assistance of counsel when counsel failed to investigate the recidivist charge, object to it, and force the state to prove the former convictions.

Upon a careful review of the pleadings and applicable law, the court finds that petitioner's claims are without merit and, as a result, that the writ of habeas corpus should be denied.

Petitioner's claims are more suited to the situation where a person is convicted based on a jury verdict and the sentence is then enhanced based on previous convictions. Here, petitioner pled guilty to these crimes, including the recidivist portion. The plea was made pursuant to an agreement with prosecutors. There is no indication that petitioner disputed the use of the former convictions. He claims now that the former convictions are unconstitutional, but presents no evidence to that effect.

A copy of the Summary of Facts ("Summary") with petitioner's guilty plea is contained in the exhibits to the Memorandum Brief in Support of Motion to Dismiss Petition for Writ of Habeas Corpus for Failure to Exhaust State Remedies (Docket #6, Exhibit A). The form, signed by petitioner, the judge, and both attorneys, shows that petitioner was questioned about his mental state, that he was informed of the charge

(including the AFC portion), the minimum and maximum penalties, and the rights he was giving up, and that he was pleading guilty because he did the act charged and was pleading pursuant to a plea agreement, but without coercion or compulsion.

It should be noted that, although petitioner is challenging only the sentence he received, he received almost the minimum possible sentence. The statutory sentence for the crime ranged from twenty years to life. (Summary). Petitioner received a twenty-five year sentence to be served concurrently with his Arkansas sentence. Petitioner's argument seems to assume that the recidivist portion of the crime is separate from the crime he pled guilty to, but that is incorrect. He pled guilty to the crime which included the recidivist element. As an example, petitioner did not plead guilty to "robbery with a dangerous weapon", instead he pled guilty to "robbery with a dangerous weapon AFCF".

The Tenth Circuit dealt with this question in Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990). In Bailey, a petitioner for habeas corpus claimed that his current sentence was improperly enhanced by a 1973 conviction. The 1973 conviction was based on a guilty plea made to avoid the prosecution's use of a 1971 conviction. The 1971 conviction was, for the sake of argument, assumed to be invalid. The court said:

> Finally, if petitioner had not pleaded guilty but had gone to trial on the 1973 charges and been convicted, and the prosecution had used his 1971 conviction to impeach his credibility or enhance his sentence, this court would have set aside the 1973 conviction as unconstitutional....
>
> However, a conviction based on a guilty plea differs from a conviction based on a guilty verdict in two important respects. First, '[c]entral to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment.' ...

> Second, when a defendant pleads guilty, he makes a decision based on a calculated risk that the consequences that will flow from entering the guilty plea will be more favorable than those that would flow from going to trial. This inherent uncertainty does not make the plea involuntary....
>
> In addition, when petitioner chose to plead guilty while believing himself to be innocent, he took a calculated risk that he would fare better by pleading guilty than by going to trial. The fact that his assessment of the risk was based on a faulty premise, that his 1971 conviction would continue to be valid, did not render his plea either involuntary or unintelligent.

Id. at 1441-42 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

Petitioner makes no attempt to support his bald assertion that his previous convictions are invalid. He does not claim that he ever told his counsel that they were invalid. He received the minimum sentence in light of the potential. He pled guilty with full knowledge of the charge and its effect. He does not claim that his plea was not voluntary and knowing. In short, petitioner has given no grounds upon which to predicate relief.

Two matters remain to be clarified. Petitioner notes that under Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), he can raise these claims now in spite of the fact they were not raised on appeal. The Tenth Circuit ruled that expired convictions can be challenged through current convictions enhanced by those earlier convictions in Gamble. However, this case is not relevant to petitioner's situation where he had a state forum in which to challenge his prior convictions, that being a trial, and waived that opportunity by pleading guilty to a crime enhanced by the prior convictions.

Second, petitioner claims he was denied effective assistance of counsel because his counsel did not investigate and challenge the prior convictions. Again, petitioner never asserts he told counsel the convictions were invalid. In accordance with Strickland v.

Washington, 466 U.S. 668, 687 (1984), "[t]o prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced his defense." Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989).

In the context of a guilty plea, the defendant can satisfy the first prong of the Strickland test if he:

> proves that counsel's 'advice was not within the wide range of competence demanded of attorneys in criminal cases.' The proper standard for measuring attorney performance is reasonably effective assistance. The second prong is met if [the defendant] shows that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. The defendant must overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'

Id. (citations omitted).

The court in Bailey, 914 F.2d at 1440, concluded that counsel could not reasonably be expected to investigate or challenge an earlier conviction when not informed of the facts that might suggest it was invalid. The court concluded that counsel's conduct did not fall below an objective standard of reasonableness considering all the circumstances when he advised that a plea of guilty be entered. The same is true here.

When petitioner pled guilty, he waived many rights, among which was the right to force prosecutors to prove prior convictions. He cannot now successfully claim he was denied that which he voluntarily abandoned.

For the foregoing reasons, petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 29th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Asbestos Workers Locals 64 & 22)
)
Plaintiff(s))
)
vs.) No. 92-C-682-B
)
Charles Juby, et al)
)
Defendant(s))

ADMINISTRATIVE CLOSING ORDER

The **Defendants**, having filed it's petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 29th day of Oct., 19 92.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLOSED

DARRYL S. HAYES, an individual,

Plaintiff,

v.

THE CITY OF NOWATA, a Political Subdivision of the State of Oklahoma; JACK HUGHES, an individual and as City Manager of the City of Nowata; JAY ROBERTSON, an individual and as Mayor of the City of Nowata; THE COUNTY OF NOWATA, an Oklahoma State Political Subdivision; HAROLD LAY, Ex-Sheriff of Nowata County and as an individual; ED HAWN, Ex-Deputy of Nowata County and as an individual; HARIS STANART, an individual and as County Commissioner of Nowata County; JACK C. DUGGER, an individual and as County Commissioner of Nowata County; PHILLIP W. MOORE, an individual and as County Commissioner of Nowata County; and WILLIAM CODY, Ex-Undersheriff and Chief of Police of Nowata County (sic) and as individual,

Defendants.

Case No. 89-C-382-B

J U D G M E N T

In accord with the Order entered simultaneously herein, granting Defendants William Cody and Ed Hawn's Motions For Summary Judgment on all issues remaining herein, Judgment is hereby granted

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in favor of Defendants Cody and Hawn in their official capacities as former Undersheriff and Deputy Sheriff of Nowata County, State of Oklahoma and against the Plaintiff Darryl S. Hayes on all claims herein. Further, in accord with the Order entered September 4, 1992, Judgment is granted in favor of Defendants Cody and Hawn in their individual capacities and against the Plaintiff Darryl S. Hayes on all claims herein.

Costs are assessed against Plaintiff Hayes if timely applied for pursuant to Local Rule 6 E, with parties to pay their own respective attorneys fees.

DATED this 20th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

vs.

A. GONZALEZ, INC., a foreign corporation; and ALBERT GONZALEZ, SR., ALBERT GONZALEZ, JR., and AMELIA GONZALEZ, individuals,

Defendants.

Case No. 92-C-340-B

ADMINISTRATIVE CLOSING ORDER

Thrifty Rent-A-Car System, Inc. ("Thrifty") and the Defendants, A. Gonzalez, Inc., Albert Gonzalez, Sr., Albert Gonzalez, Jr. and Amelia Gonzalez, have settled this action pursuant to the terms of a Settlement and Release Agreement dated as of October 16, 1992. Under the terms of that Agreement, the Defendants have agreed to pay Thrifty a sum of money by November 20, 1992. The Agreement gives Thrifty the right to proceed with this action if payment is not received.

It is hereby Ordered that the Clerk administratively terminate this action in his records, without prejudice to the right of Thrifty to reopen this action for the purpose of enforcing its rights under the terms of the Settlement and Release Agreement.

IT IS ORDERED this 27 day of oct, 1992.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

md099293

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 28 1992

MARION MORGAN,

Plaintiff,

vs.

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma Corporation,

Defendant.

No. 92-C-537-E

FILED
OCT 27 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER AND JUDGMENT

COMES NOW BEFORE THE COURT the Joint Stipulation of Dismissal of this action without prejudice. Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure and the Joint Stipulation of the parties, the Court hereby dismisses the action without prejudice in its entirety.

ORDERED this 27th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLOBE INDEMNITY COMPANY,

Plaintiff,

vs.

LINDA J. AGEE,

Defendant.

No. 91-C-704-E

JOINT STIPULATION OF DISMISSAL

NOW on this 27 day of October, 1992, the parties come before the court. Plaintiff, Globe Indemnity Company, is represented by J. William Archibald of the firm Holloway, Dobson, Hudson & Bachman; and the defendant, Linda J. Agee, is represented by Michael James King & Terry A. Hall. Plaintiff, Globe Indemnity Company, does not make any claim for subrogation herein. Pursuant to Rule 41, Fed.R.Civ.P., the parties hereby stipulate to a joint dismissal of this action with prejudice to the refiling thereof.

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By: _____
J. WILLIAM ARCHIBALD, OBA #314
Attorneys for Plaintiff Globe

-and-

_____
MICHAEL JAMES KING & TERRY A. HALL
Attorneys for Defendant
7130 South Lewis Avenue
Galleria Tower One, Suite 720
Tulsa, OK 74136

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUMBAUGH & FULTON COMPANY, an Oklahoma corporation,

Plaintiff,

vs.

VEREX ASSURANCE, INC., an insurance company,

Defendant.

Case No. 89-C-1015-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Brumbaugh & Fulton Company, by and through its counsel, Ron Main of Main & Downie, and Verex Assurance, Inc., by and through its counsel, James P. McCann of Doerner, Stuart, Saunders, Daniel & Anderson, pursuant to the provisions of Rule 41(a)(1), Fed. R. Civ. P., hereby jointly stipulate to a Dismissal With Prejudice of the above-referenced case, such dismissal to be with prejudice to any subsequent refiling.

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Attorneys for Plaintiff,
Brumbaugh & Fulton Company

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Attorneys for Defendant,
Verex Assurance, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEE SHELDON,)
)
Plaintiff,)
)
vs.) No. 91-C-771-E
)
UNITED STATES OF AMERICA,)
)
Defendant.)

ORDER AND JUDGMENT

This case was heard on the 5th day of October, 1992. The gravamen of the claim is a textbook "slip and fall" in the south lobby of the Tulsa Post Office, downtown branch. Plaintiff seeks remedies for the injuries she sustained pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. The matter was heard as a bench trial and the court, accordingly, submits herewith its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Lee Sheldon, was a resident of Tulsa County, State of Oklahoma, at all times relevant hereto.
2. On February 10, 1990, Lee Sheldon tripped and fell while exiting the south lobby of the United States Post Office located in downtown Tulsa, Oklahoma.
3. That the building in which the post office is located is owned and operated by the Defendant.
4. At the time of the Plaintiff's fall, she was a business invitee, on Defendant's premises for the purpose of depositing letters in the United States Mail.

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5. At the time of the Plaintiff's fall, she was sixty-two (62) years of age with a life expectancy of 21.86 years.

6. This Court has jurisdiction and venue of this action. This action is brought pursuant to 28 U.S.C. §2671 et seq. The required Notice of Claim for damages to the United States of America was given by Plaintiff, Lee Sheldon, on February 20, 1990, and supplemented on March 20, 1991. This claim was denied by the United States Postal Service by certified mail dated May 31, 1991, received by Plaintiff's counsel on June 4, 1991.

7. That on February 10, 1990, at approximately 11:00 o'clock p.m., Plaintiff drove to the downtown post office for purpose of mailing Valentines to her grandchildren in California. When she stopped her automobile at the "drive by" mailboxes, a sign placed there indicated no mail would be picked up after 8:30 p.m. and it would be necessary to deposit any mail in the boxes located in the south lobby.

8. On or before February 10, 1990, there was a floor mat immediately inside the entrance doors to the south lobby. On that date, the weather in Tulsa was clear and dry with temperatures of approximately forty (40) degrees.

9. That in attempting to exit the south lobby of the Post Office, Plaintiff tripped on a "wrinkle" or "buckle" in the mat and fell.

10. That, as a result of the Plaintiff's fall, Plaintiff

sustained injuries resulting in past medical bills in the amount of Ten Thousand Four Hundred Sixty and 28/100 Dollars ($10,460.28) with future surgery recommended for decompression of the left shoulder.

11. The Plaintiff's injuries are permanent and have resulted in disfigurement, pain and suffering, past and future, and permanent partial disability of 38.5% to the left arm, which converts to 23% permanent partial impairment to the body as a while as determined by the American Medical Association Guidelines for Evaluating Permanent Impairment, Third Edition, Revised. Additionally, as to injuries to the right knee, Plaintiff has sustained permanent partial disability of 15% as determined by the AMA Guidelines for Evaluating Permanent Impairment, Third Edition, Revised.

12. That Gary Morgan, Supervisor of Custodians for the Post Office, admitted that the floor mat at issue was known to have had "wrinkles" prior to Plaintiff's fall.

13. That Defendant's United States Postal Service Maintenance Handbook: Floors, Care and Maintenance, Maintenance Series Handbook MS-10 at pages 4-1 and 4-2 is indicative of Defendant's knowledge that the floor mat could present a hazard by developing "wrinkles".

14. That no signs were in place warning the Plaintiff or other foreseeable business invitees of the potential danger presented by a "wrinkle" in the floor mat.

15. That Maurice Bunch was in charge of "policing" the south lobby on the evening in question.

16. That Maurice Bunch acknowledged on prior occasions he had seen "wrinkles" in the floor mat at issue.

17. That Maurice Bunch also acknowledged he had never seen the Manual identified in Finding #13, supra.

18. That Maurice Bunch was not trained by Defendant to look for wrinkles in floor mats as a part of his policing duties.

CONCLUSIONS OF LAW

1. Defendant owed a duty of reasonable care to its business invitees; Plaintiff on the evening in question was a business invitee.

2. Defendant had constructive notice of the potential hazard presented by "wrinkles" in its lobby floor mats.

3. Defendant failed to exercise reasonable care in the maintenance of its floor mats by failing to implement a policy insuring proper inspection of the mats and failing to instruct employees regarding their duty to inspect or "police" the floor mats in the Post Office lobbies, and by failing to warn foreseeable business invitees of the hazard.

4. Plaintiff exercised reasonable care for her safety in attempting to exit the south lobby on the evening in question.

5. Defendant's breach of its duty of reasonable care was the proximate cause of the Plaintiff's injuries.

6. Plaintiff should be, and hereby is, awarded damages in the sum of Seventy-five Thousand Dollars ($75,000.00) for pain, suffering and permanent disability, plus her past medical expenses in the sum of Ten Thousand Four Hundred Sixty and 28/100 Dollars ($10,460.28), together with future medical expenses in the sum of Nine Hundred Ninety Dollars ($990.00) or a total damage award of Eighty-six Thousand Five Hundred Fifty and 28/100 Dollars ($86,550.28) plus interest thereon and costs.

ORDERED this 27th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DENNIS DEAN WRIGHT	)	
	)	
Petitioner,	)	
v.	)	92-C-514-E
	)	
STEPHEN KAISER	)	
	)	
Respondent.	)	

ORDER

Now before this Court is Respondent's Motion To Dismiss As Abusive Petition pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases. Petitioner Dennis Dean Wright, who is serving a life sentence plus an additional 20 years for first-degree murder and conspiracy to commit murder, seeks habeas relief. *See Harjo v. State*, 797 P.2d 338 (Okl.Cr. 1990).

However, since the instant petition is Wright's second, the issue is whether he has abused the writ. The rule is:

> **When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that the petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom...If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he...can show that a fundamental miscarriage of justice would result from failure to entertain the claim.** *McCleskey v. Zant*, 111 S.Ct. 1454, 1470 (1991).

In this case, Respondent has met his burden, noting that Wright's first habeas petition was decided on the merits by this Court on March 25, 1991. The instant petition, which is Wright's second one, was filed on March 9, 1992.[1]

As discussed by *McCleskey*, the question is whether Wright has shown either cause-and-prejudice for not raising his claims here in the earlier petition or whether he can show that a fundamental miscarriage of justice would occur if this Court did not examine the merits of the second petition.

Wright has made neither showing. He argues that supervening change in the law constitutes cause for his failure to raise the instant claims in his first habeas petition. But he cites *Grady v. Corbin*, 110 S.Ct. 2084 (1990), a case decided on May 29, 1990 -- nearly a year before this Court decided the merits of his first habeas petition. He raises several other issues, including ineffective assistance of counsel, which upon review are without merit. He also professes innocence as to his conviction for first-degree murder and conspiracy to commit murder, but offers no evidence. Therefore, this Court finds that Petitioner has abused the writ. Respondent's Motion To Dismiss is **GRANTED.**

SO ORDERED THIS 27th day of October, 1992.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[1] *Wright raises six habeas claims in his latest petition: (1) First-degree murder information was defective; (2) Prejudicial evidence during his trial; (3) Ineffective appellant counsel; (4) double jeopardy violation; and (5) Error because his trial was no severed from that of his co-defendant. In his first habeas, Wright alleged ineffective assistance of counsel and that trial testimony was improperly admitted.*

ENTERED

FILED

OCT 27 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC. an Oklahoma corporation,

Plaintiff,

v.

DILLON ENGINEERING CORPORATION, an Oklahoma corporation,

Defendant.

Case No. 91-C-916-B

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Thrifty Rent-A-Car System, Inc. and Defendant Dillon Engineering Corporation, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby stipulate and agree that this action should be dismissed with prejudice. It is further stipulated that the parties will be responsible for their respective costs, expenses and attorneys' fees.

Dana L. Rasure, OBA #7421
Victor E. Morgan, OBA #12419
BAKER & HOSTER
800 Kennedy Building
Tulsa, OK 74103
(918) 592-5555

Randall J. Holder, OBA #04292
THRIFTY RENT-A-CAR SYSTEM, INC.
5330 East 31st Street
Tulsa, OK 74153

Attorneys for Plaintiff
Thrifty Rent-A-Car System, Inc.

Mark Kachigian
Scott Zingerman
HEAD & JOHNSON
228 West 17th Place
Tulsa, OK 74119

Attorneys for Defendant
Dillon Engineering Corporation

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 27 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
vs.	)	No. 92-C-183-E
FRANCES K. KISSEE, Personal Representative of the Estate of JACK KISSEE, Decedent	)	
Defendant.	)	

ON DOCKET
OCT 27 1992

ORDER AND JUDGMENT

COMES NOW before the Court the Motion for Summary Judgment of the Plaintiff, FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity (hereinafter "FDIC").

Although the relief contemplated by Federal Rule of Civil Procedure 56 is drastic and should be applied with caution so that litigants will have an opportunity for trial on bona fide factual disputes[1], summary judgment shall be rendered if the pleadings and other documents on file with the Court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In a case such as this, where Defendant has utterly failed to submit any evidence to the Court to contradict the allegations of the Plaintiff, the last two sentences of subsection (e) of Fed.R.Civ.Proc. 56 must be considered:

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[1] Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir. 1975); Jones v. Nelson, 484 F.2d 1165, 1168 (10th Cir. 1973); Machinery Center, Inc. v. Anchor National Life Insurance Co., 434 F.2d 1, 6 (10th Cir. 1970).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Advisory Committee Notes concerning that subsection, and following that rule, provide the following reasons for the addition of the above two sentences:

> The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some, but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation, Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded" and not suppositious, conclusory, or ultimate. [Citations to Third Circuit Cases omitted].
>
> The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice and Procedure 1235.1 (Wright ed. 1958).
>
> It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The record establishes in this case that Defendant has submitted no evidence beyond the pleadings and that Plaintiff has demonstrated

beyond a reasonable doubt that no genuine issue as to any material fact remains.

In addressing the issue of whether Plaintiff's claim is barred by the statute of limitations, the Court can only conclude that Plaintiff timely filed its claim. Commercial Code, Okla. Stat. tit. 12A, §3-118(a) (Supp. 1992) provides the applicable limitations period for demand instruments such as the Promissory Note in issue:

> . . .[A]n action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note....

The six year limitations period first began to run on July 8, 1988, and, without even considering the effect of the alleged extension agreement or the alleged partial payments, this action, filed March 3, 1992 came well within the six year period.[2]

Finally, on the issue of whether the Note was supported by due consideration, the Court finds that the purpose of the Note, as stated on the face of the document, was to satisfy pre-existing obligations of the payee to the payor as well as to provide operating money to the payee. The law is clear in this area. A written instrument is presumptive evidence of consideration, and the burden of showing want of consideration sufficient to support

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[2] The Court further notes that any validly entered extension agreement would act to extend the operation of the statute of limitations until the extended date of maturity. See Farris v. Sturner, 264 F.2d 537 (10th Cir. 1959). Likewise any partial payments made on the note would extend the operation of the limitations period until the last payment made. See Okla.Stat.tit. 12, §101; Farris v. Sturner, supra.

an instrument lies with the party seeking to invalidate or avoid it.[3] Thus, the burden is on the Defendant in this case to show want of consideration and Defendant has submitted no evidence outside of the pleadings. A note given in renewal or payment of a prior note is supported by valuable consideration in that the acceptance of the new note and the surrender of the old note operate as legal detriment suffered by the promisee.[4] Clearly, tne Note was executed for sufficient consideration.

The Court having reviewed the pleadings and filings in this action, finds that no material issues of fact exist to be litigated and that judgment should be entered as a matter of law in favor of Plaintiff, FDIC.

SO ORDERED, ADJUDGED AND DECREED this 26th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

[3] Silk v. Phillips Petroleum Co., 760 P.2d 174 (Okla. 1988).

[4] Kelly v. Citizens--Farmers National Bank of Chickasha, 77 P.2d 681 (Okla. 1930); Nease v. National Bank of Commerce, 50 P.2d 312 (Okla. 1935).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

vs.

INTERMOUNTAIN RENTALS, INC., a foreign corporation; CRAIG S. RIDINGS, an individual; and CHARLENE H. RIDINGS, an individual;

Defendants.

Case No.91-C-838-B

EOD 10/27/92

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), pursuant to Rule 41(a) of the Federal Rules of Civil Procedure and the terms of a settlement agreement between the parties, and hereby dismisses the above-captioned case, with prejudice.

Respectfully submitted,

LIPE, GREEN, PASCHAL, TRUMP & GOURLEY, P.C.

By: Mark E. Dreyer
Richard A. Paschal, OBA #6927
Mark E. Dreyer, OBA # 14998
401 South Boston Ave., Ste. 2100
Tulsa, Oklahoma 74103
(918) 599-9400

ATTORNEYS FOR PLAINTIFF, THRIFTY RENT-A-CAR SYSTEM, INC.

CHEADLE & ASSOCIATES, INC.

By: Grant E. Cheadle
Grant E. Cheadle, OBA #1634
610 S. Main St., Ste. 212
Tulsa, Oklahoma 74119
(918) 585-8500

ATTORNEY FOR DEFENDANTS, CRAIG RIDINGS, CHARLENE RIDINGS, and INTERMOUNTAIN RENTALS, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 22 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
vs	)	91-C-550-E
	)	
RAE ANN BENSON,	)	
	)	
Defendant.	)	

OCT 22 1992

PAYMENT AGREEMENT

Plaintiff, the United States of America, having obtained its judgment herein, and the defendant, having consented to this Payment Agreement, hereby agree as follows:

1. Plaintiff's consent to this Payment Agreement is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that she is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that she will willingly and truly honor and comply with the Payment Agreement entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 30th day of September, 1992, the defendant shall tender to the United States a check or money order payable to the "U. S. Department of Justice", in the amount of $60.00 and a like sum on or before the 30th day of each following month until the entire amount of the Judgment, together with costs and accrued post judgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney's Office, Debt Collection Unit, 333 West 4th, 3900 U. S. Courthouse, Tulsa, OK 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U. S. Rule, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. §1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth in (b) above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to, her Federal income tax returns) within fifteen (15) days of the date of a request for such evidence by the United States Attorney.

2. Default under the terms of this Payment Agreement will entitle the United States to execute on the judgment without notice to the defendant.

3. The defendant has the right of prepayment of this debt without penalty.

4. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or,

should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

/s/ JAMES O. ELLISON
United States District Judge

APPROVED AS TO FORM:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS
Assistant U. S. Attorney
Attorney for Plaintiff

Rae Benson
RAE ANN BENSON, Debtor

CLOSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 14 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HAROLD DEAN HORNSBY,

Plaintiff,

vs.

STEVE WHITTLE, ET AL.,

Defendants.

No. 92-C-800-E

EOD 10/27/92

ORDER

Plaintiff filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is granted. However, Plaintiff's action shall be dismissed without service as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed with a plaintiff who is being allowed to commence an in forma pauperis action. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 329, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of

bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id. at 327.

Consequently, courts have the responsibility to dismiss lawsuits which are frivolous or malicious. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Id. at 325. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 324.

The Supreme Court recently revisited Neitzke in Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728 (1992). The Court held that a dismissal under § 1915(d) is entrusted to the discretion of the court entertaining the in forma pauperis action, and should only be reviewed for an abuse of discretion. Id. at 1734.

Applying Neitzke and Denton to the case at hand, this court finds that Plaintiff's complaint lacks an arguable basis in law, and should be dismissed as frivolous. Plaintiff, currently incarcerated at the Tulsa County Jail, was formerly an employee with the City of Tulsa Fire Department. Plaintiff names as defendants the local firefighter's union and its president. He alleges they deprived him of a constitutional right to assistance and representation at his pre-termination hearing and termination from his employment with the fire department.

In a section 1983 action, a plaintiff must allege the violation of a right secured by the Constitution or laws of the

United States, and must show that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Shaw v. Neece, 727 F.2d 947, 949 (10th Cir. 1984). It appears to the court that Plaintiff has failed to meet both of these tests.

Plaintiff does not state what constitutional right he has to representation by a union at a pre-termination hearing, and the court knows of no such right. In addition, it does not appear that the union or its president were acting under color of state law. See West, 487 U.S. at 49-50.

Accordingly, Plaintiff's complaint shall be dismissed without prejudice at this time. Plaintiff shall have twenty (20) days to file an amended complaint attempting to overcome the deficiencies noted in this order, if he so wishes.

SO ORDERED THIS 14th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ALLEN DOYLE BAILEY and RHONDA BAILEY,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, a Delaware corporation,

Defendant.

No. 92-C-166 B

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having before it the written Stipulation for Dismissal Without Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Stipulation for Dismissal Without Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same are hereby dismissed without prejudice. IT IS SO ORDERED this 22nd day of October, 1992.

S/ THOMAS R. BRETT

THOMAS R. BRETT
Judge of the U.S. District Court

C:\WORD\BAILEY\ORDDIS
JAD/bjo

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.,

Plaintiff,

vs.

THOMAS A. TOYE, an individual, et al.,

Defendants.

No. 91-C-739-E

ORDER AND JUDGMENT

The Court has for consideration the Motion of the Defendants for Summary Judgment as to all claims and counterclaims herein (docket #14). The pivotal issue of liability in this matter concerns the interpretation of an "Acquisition Agreement" ("Agreement") between the parties. Material facts on that issue are not in dispute and the matter is ripe for resolution as a matter of law.

The Court has reviewed the record and has concluded that, under well-settled principles of contract construction, Defendants' Motion should be granted. The Court specifically finds that the Agreement is unambiguous and that, pursuant to its terms, Plaintiff assumed the liabilities in dispute. The Court further finds that paragraph 14(b) of the Agreement as construed under paragraph 14(c) thereof compels a finding that evidence of prior understandings of the parties are precluded and inadmissible to alter the terms of the Agreement. Plaintiff, the drafting party of the Agreement, contends in alternative claims that there was a mutual mistake of

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fact on the assumption of liabilities. The Court finds there is no competent evidence in support of that contention. Finally, Plaintiff, the drafter, urges this Court to find that the plain meaning rendition of the terms of the Agreement results in the Defendants being unjustly enriched. The Court can find no grounds for reaching that conclusion. The Court, accordingly, finds that none of the theories advanced by Plaintiff on the issue of liability can be sustained.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment is granted;
2. Within twenty days of the date of this Order the parties shall, by Joint Status report, notify the Court of the resolution of the remaining accounting and post-closing adjustments.

ORDERED this 26th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY LEE and ANNA LEE, as Co-Trustees of the BOBBY LEE REVOCABLE TRUST dated May 14, 1991,

Plaintiffs,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant.

Case No. 92-C-18-B

O R D E R

This matter comes on for consideration of the issue of attorneys fees payable to Defendant by Plaintiffs in pursuance to this Court's Order of July 28, 1992.

This matter was removed from Creek County District court by Southwestern Bell Telephone Company (SWB) on January 9, 1992, predicated upon federal diversity jurisdiction. Plaintiffs filed their Motion to Remand on January 13, 1992, alleging lack of the requisite jurisdictional amount ($50,000). By this Court's Order of April 1, 1992, Plaintiffs' Motion To Remand was denied because, when injunctive relief is sought (as in this case), the interest of either party or both parties may be looked to in determining the amount in controversy. The Court concluded Plaintiffs' prayer coupled with Defendant's response as to the cost of being required by injunction to remove its lines more than established the requisite jurisdictional amount.

Plaintiffs then filed a Motion to voluntarily dismiss their action without prejudice, the parties agreeing a dismissal without prejudice under Rule 41 (a)(2),[1] F.R.Civ.P. is within the sound discretion of the Court. **Maryland Cas. Co. v. Quality Foods**, 8 F.R.D. 359 (E.D.Tenn.1948)); **Hannah v. Lowden**, 3 F.R.D. 52 (W.D.Okla.1943); **Stevens v. Red Barn Chemicals, Inc.**, 76 F.R.D. 111 (W.D.Okla.1977); **Chase v. Ware**, 41 F.R.D. 521 (N.D. Okla. 1967).

The Court concluded, in the interest of judicial economy and considering the status and stature of the parties herein, Plaintiffs would be permitted to dismiss this action without prejudice conditioned upon the payment to Defendant of reasonable attorneys fees and costs incurred in this Court. The Court directed the Defendant to file an itemized statement of attorneys fees and costs which was done on August 10, 1992. Defendant claimed costs in the amount of $120.00 and attorneys fees of $535.50.[2]

Plaintiffs thereafter filed their objection, agreeing that the costs and attorneys fees were reasonable but that the same should not be allowed because Defendant's counsel was "in house counsel", a salaried employee of Defendant rather than an independent fee-charging lawyer.

Defendant responded that its counsel was indeed "in house" but that attorneys fees were nonetheless recoverable, citing **PPG Ind.,**

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[1] Rule 41 (a)(2) provides that "upon order of the Court and upon such terms and conditions as the Court deems proper" the Plaintiff may dismiss his case without prejudice.

[2] The attorneys fees were calculated on 4 1/2 hours of attorney time at the hourly rate of $119.00.

Inc. v. Celanese Polymer Specialties Co, 840 F.2d 1565, 1569-70 (Fed.Cir. 1988), **Texter v. Board of Regents**, 711 F.2d 1387, 1396-97 (7th Cir.1983) and other cases.

The Court concludes the attorneys fees of Defendant, admittedly reasonable in amount, are a proper and allowable expense irrespective of being "in house" counsel costs. The Court further concludes Defendant should be and it is awarded costs in the amount of $120.00 and attorneys fees in the amount of $535.50. A separate Judgment is conformance herewith will be simultaneously entered herein.

IT IS SO ORDERED this 23rd day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY LEE and ANNA LEE, as Co-Trustees of the BOBBY LEE REVOCABLE TRUST dated May 14, 1991,

Plaintiffs,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant.

Case No. 92-C-18-B

J U D G M E N T

In accord with the Order entered simultaneously herewith, granting Defendant costs and attorneys fees in the total amount of $655.50, Judgment is granted in favor of Defendant and against the Plaintiffs in the amount of $655.50. with interest thereon, from this date until paid, in the amount of 3.24% per annum. Further, Plaintiffs' action is hereby dismissed, without prejudice.

DATED this 23rd day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE WHEATLEY,

Plaintiff,

vs.

DONALD J. GUY,

Defendant.

Case No. 92-C-160-B

JUDGMENT BY DEFAULT

Now on this 22nd day of October, 1992, the above captioned matter comes before the undersigned Judge of the District Court. The Court, having reviewed the pleadings herein and the Clerk's entry of default, finds that the Defendant, Donald J. Guy, was duly served with summons and copy of Complaint herein within the proscribed times and is in default. The Court further finds that the allegations of the Plaintiff's Complaint should be taken as true and judgment entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment is entered in favor of the Plaintiff, Wayne Wheatley, and against the Defendant, Donald J. Guy, for the principal sum of $70,000, plus interest accrued from March 3, 1991, to this date in the sum of $12,908.90[1], postjudgment interest on said total

[1] This amount is based on an interest rate of 12% per annum. Although the agreement provides for interest at the rate of twelve and one-half percent per annum, Plaintiff's prayer only seeks twelve percent per annum.

judgment of $82,908.90 at the legal rate of 3.24% per annum[2] till paid. Costs are assessed against the Defendant if timely applied for pursuant to Local Rule 6. Plaintiff's attorney's fee is also assessed against the Defendant in an amount to be determined at a hearing the 17th day of December at 9 a.m. Plaintiff is granted until November 2, 1992, to file an affidavit and brief in support (not to exceed 3 pages) of his request for attorney's fee.

IT IS SO ORDERED THIS 22nd DAY OF OCTOBER, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2] Plaintiff's prayer seeks postjudment "as allowed by law" but his Motion for Default Judgment seeks postjudgment interest at the contract rate of 12% per annum. Plaintiff's attorney states in his affidavit, which was attached to the Motion, that:

> [P]ursuant to the relief requested in the Plaintiff's complaint, the Plaintiff is entitled to ... postjudgment interest ... at the parties contract rate of 12% per annum till paid....

The Court finds no basis in the agreement for awarding postjudgment interest at the contract rate and thus postjudgment interest will accrue at the legal rate.

CLOSED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ON DOCKET
OCT 26 1992

FILED

OCT 23 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

HANG H. LAI,

Plaintiff,

vs.

ALVIN W. LAVENDER II,
Oklahoma Highway Patrolman,

Defendant.

Case No. 91-C-897-E

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The court has been advised by the Plaintiff, Hang H. Lai, and the Defendant, Alvin Lavender, II, through his counsel of record, Susan B. Loving, Oklahoma Attorney General, by W. Craig Sutter, Assistant Attorney General, that this action has been settled, without an admission of liability on the part of the Defendant, and that the action shall be dismissed with prejudice, pursuant to the terms agreed upon by the respective parties.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

APPROVED:

Hang Lai 10/20/92
Hang H. Lai
Plaintiff

W. Craig Sutter
Assistant Attorney General
Attorney for the Defendant,
Alvin Lavender, II

Lai\TL-91-122

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAR RENTAL LICENSEE ASSOCIATION, INC., a Nevada corporation,	)	
Plaintiff,	)	
vs.	)	No. 90-C-1060-B
BUDGET RENT A CAR CORPORATION, a Delaware corporation,	)	
Defendant.	)	

ORDER DISMISSING COMPLAINT

This matter coming for hearing on the stipulation of the parties, and the Court being fully advised,

IT IS ORDERED, ADJUDGED AND DECREED, that all claims by plaintiff Car Rental Licensee Association, Inc. are dismissed with prejudice and without costs on the ground that said plaintiff lacks standing to assert such claims.

DATED at Tulsa, Oklahoma, this 22nd day of October, 1992.

ENTER: THOMAS R. BRETT,

THOMAS R. BRETT
United States District Judge

561-2.34/rawp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAR RENTAL LICENSEE ASSOCIATION, INC., a Nevada corporation,	)	
Plaintiff,	)	
vs.	)	No. 90-C-1060-B
BUDGET RENT A CAR CORPORATION, a Delaware corporation,	)	
Defendant.	)	

ORDER DISMISSING COUNTERCLAIM

This matter coming for hearing on the stipulation of the parties, and the Court being fully advised, the Court makes the following findings:

1. The counterclaim in this action was commenced by defendant and counterplaintiff, Budget Rent A Car Corporation ("Budget"), seeking declaratory judgment with respect to its authority under certain provisions of applicable license agreements.

2. The Court has determined, based on the procedural posture of this case, that the counterclaim is actually directed at five individual entities: (1) Leebron & Robinson Rent A Car, Inc. d/b/a Budget Rent A Car of Shreveport; (2) Louisiana Rent A Car, Inc. d/b/a Budget Rent A Car of Baton Rouge; (3) Currey Enterprises, Inc. d/b/a Budget Rent A Car of Amarillo, etc.; (4) Ryan & Davis, Inc. d/b/a Budget Rent A Car of Austin; and (5) Miljack, Inc. d/b/a Budget Rent A Car of

Tulsa, and the parties have acknowledged the accuracy of this determination.

3. On March 6, 1992, the Court entered an Order granting Budget's motion for summary judgment on its counterclaim in part and denying that motion in part. The denial related to Budgets claims against Currey Enterprises, Inc. d/b/a Budget Rent A Car of Amarillo and Ryan & Davis, Inc. d/b/a Budget Rent A Car of Austin.

4. Thereafter, Currey Enterprises, Inc. d/b/a Budget Rent A Car of Amarillo and Ryan & Davis, Inc. d/b/a Budget Rent A Car of Austin have sought affirmative relief against Budget, filing, among other things, a motion for summary judgment which would afford them affirmative relief. As of this date, no judgment has been entered by the Court with respect to the aforementioned claims for affirmative relief and the Court has been advised by the parties that all such disputes, and all other disputes with the remaining counterclaim defendants have been resolved by agreement of the parties.

5. The parties have agreed and stipulated that there shall be no appeal of the Court's decision regarding the Counterclaims and have resolved all matters raised in the Counterclaims (and in any pending motions relating to the Counterclaims) by agreement between them.

Accordingly,

IT IS ORDERED that the Counterclaim in the above-captioned proceeding be dismissed with prejudice and without costs.

DATED at Tulsa, Oklahoma, this 22nd day of October, 1992.

ENTER:

S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

561-2.44/rawp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,

Plaintiff,

vs.

PCI RENTS, INC., a foreign corporation, and W. D. BUSKE, an individual,

Defendants.

Case No. 92-C-087-B

ADMINISTRATIVE CLOSING ORDER

Thrifty Rent-A-Car System, Inc. ("Thrifty") and the Defendant, W. D. Buske, have settled this action pursuant to the terms of a Settlement and Release Agreement dated as of October 15, 1992. Under the terms of that Agreement, the Defendant, W. D. Buske, has agreed to pay Thrifty a sum of money over time. The Agreement gives Thrifty the right to move the Court for the entry of a Judgment in the future, if certain circumstances exist.

It is hereby Ordered that the Clerk administratively terminate this action in his records, without prejudice to the right of Thrifty to reopen this action for the purpose of enforcing its rights under the terms of the Settlement and Release Agreement.

IT IS SO ORDERED this 20th day of October, 1991.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARMEN HAAS,

Plaintiff,

v.

LIFE FLEET OKLAHOMA, INC., and TOMMY HUDDLESTON,

Defendants.

Case No. 91-C-822-B

EOD 10/26/92.

JUDGMENT PURSUANT TO RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE

This action was commenced by personal service of summons and complaint on defendant LifeFleet Oklahoma, Inc. ("LifeFleet") on October 17, 1991.

LifeFleet offered by writing dated October 7, 1992, to allow Plaintiff to take judgment in this action against it in the sum of $10,000 inclusive of costs and attorneys' fees. Plaintiff accepted LifeFleet's offer by writing dated October 16, 1992, filing executed originals of the Offer and Acceptance with the Court on behalf of the parties.

It is therefore adjudged that Plaintiff recover $10,000, inclusive of all costs including attorneys' fees, in judgment of her claims against LifeFleet in this action. The foregoing judgment is entered pursuant to Rule 68 of the Federal Rules of

10/22/92 m to [illegible]

Civil Procedure and for the purpose of settlement, and does not constitute a finding that LifeFleet is liable in this action or has committed any wrongdoing, or that Plaintiff has suffered any damage.

Dated: Oct 22, 1992

Richard M. Lawrence
Clerk

DA922930.068

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY LEE and ANNA LEE, as Co-Trustees of the BOBBY LEE REVOCABLE TRUST dated May 14, 1991,

Plaintiffs,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant.

Case No. 92-C-18-B

J U D G M E N T

In accord with the Order entered simultaneously herewith, granting Defendant costs and attorneys fees in the total amount of $655.50, Judgment is granted in favor of Defendant and against the Plaintiffs in the amount of $655.50. with interest thereon, from this date until paid, in the amount of 3.24% per annum. Further, Plaintiffs' action is hereby dismissed, without prejudice.

DATED this 23rd day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

30

ENTERED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRENDA K. REED BLACK a/k/a BRENDA REED; JAMES BLACK; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA ex rel. DEPARTMENT OF HUMAN SERVICES, CHILD SUPPORT ENFORCEMENT; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

DOCKET
OCT 26 1992

FILED
OCT 23 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 92-C-67-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 22 day of October, 1992, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Brenda K. Reed Black a/k/a Brenda Reed, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed by certified return receipt addressee restricted mail to Brenda K. Reed Black a/k/a Brenda Reed, 532 East Seminole Place, Tulsa, Oklahoma 74106, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on April 15, 1992, in favor of the Plaintiff United States of America, and against the Defendant, Brenda K. Reed Black a/k/a Brenda Reed, with interest and costs to date of sale is $7,293.41.

The Court further finds that the appraised value of the real property at the time of sale was $2,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 15, 1992, for the sum of $2,226.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on 10-15-92, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Brenda K. Reed Black a/k/a Brenda Reed, as follows:

Principal Balance plus pre-Judgment Interest as of 4-15-92	$6,274.43
Interest From Date of Judgment to Sale	74.88
Late Charges to Date of Judgment	75.60
Appraisal by Agency	250.00
Abstracting	234.00
Publication Fees of Notice of Sale	159.50
Court Appraisers' Fees	225.00
TOTAL	$7,293.41
Less Credit of Appraised Value -	2,500.00
DEFICIENCY	$4,793.41

plus interest on said deficiency judgment at the legal rate of 3.24 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Brenda K. Reed Black a/k/a Brenda Reed, a deficiency judgment in the amount of $4,793.41, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY B. WATSON, Plaintiff,	)	
vs.	)	Case No. 92-C-211-B
JERRY WALTERS, et al., Defendants.	)	

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Larry B. Watson, and herewith Dismisses from this action Defendant Jerry Walters with Prejudice as to future actions with the understanding that Defendant will be responsible for his own attorney's fees and costs incurred in this action.

Respectfully Submitted,

David W. Mills. P.C. OBA #11678
46 East 16th Street
Tulsa, Oklahoma 74119
(918) 583-4484

CERTIFICATE OF DELIVERY

The undersigned does hereby certify that a true and correct copy of the above and foregoing instrument was delivered to:

David R. Cordell
2400 First National Tower
Tulsa, Oklahoma 74103

Steven R. Hickman
1700 Southwest Blvd.
Suite 100
P.O. Box 799
Tulsa, Oklahoma 74101

on the 21st day of October, 1992, with proper postage thereon fully prepaid.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY B. WATSON, Plaintiff,	)	
vs.	)	Case No. 92-C-211-B
JERRY WALTERS, et al., Defendants.	)	

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Larry B. Watson, and herewith Dismisses from this action Defendants Dave Kruse, Marion Finley and Paul Chapdelaine with Prejudice as to future actions with the understanding that Defendants will be responsible for their own attorney's fees and costs incurred in this action. The lone remaining defendant is American Airlines.

Respectfully Submitted,

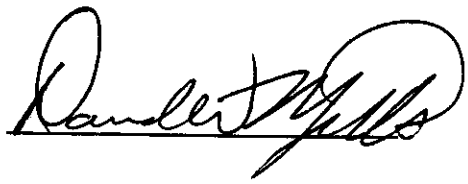
David W. Mills, P.C. OBA #11678
46 East 16th Street
Tulsa, Oklahoma 74119
(918) 583-4484

CERTIFICATE OF DELIVERY

The undersigned does hereby certify that a true and correct copy of the above and foregoing instrument wass. delivered to:

David R. Cordell
2400 First National Tower
Tulsa, Oklahoma 74103

on the 22st day of October, 1992, with proper postage thereon fully prepaid.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MPSI SYSTEMS, INC.,	
Plaintiff,	
v.	**Civil Action No. 92-C-287 B**
CONTROL SCIENCES, LTD., MADAN G. SINGH, and JEAN-CHRISTOPHE BENNAVAIL	
Defendants.	

STIPULATED ORDER OF DISMISSAL WITH PREJUDICE

Whereas the undersigned counsel, representing all of the parties in this litigation, hereby expressly stipulate that they have reached an agreement of settlement of all claims that were pleaded or could properly have been pleaded in this action by way of claim, answer, and counterclaim, and

Whereas as a part of that agreement of settlement the parties have agreed to seek this court's order that this action be dismissed with prejudice,

IT IS HEREBY ORDERED, that on the joint stipulation of all parties hereto, this action is now dismissed with prejudice.

So Stipulated:

Claire V Eagan OBA #554

Hall, Estill, Hardwick, Gable,
Golden & Nelson
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172
(918) 588-2700

Collier, Shannon, Rill & Scott
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
(202) 342-8400

Attorneys for MPSI Systems, Inc.

Michelle L. Schmidt

Jones, Givens, Gotcher & Bogan, P.C.
15 E. 5th Street, Suite 3800
Tulsa, Oklahoma 74103-4309
(918) 581-8200

Attorneys for Control Sciences Ltd.,
Madan G. Singh, and Jean-Christophe
Bennavail

So Ordered:

Thomas R. Brett
U.S. District Judge

OCT 20, 1994
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDEPENDENT SCHOOL DISTRICT NO. 1 OF PAWNEE COUNTY, OKLAHOMA a/k/a THE PAWNEE PUBLIC SCHOOLS, Plaintiff,	)	
vs.	)	CASE NO. 92-C-466-B
DEBRA A. EAVES Defendant.	)	

O R D E R

This matter comes on for consideration of Plaintiff's, Independent School District No. 1 of Pawnee County, Oklahoma a/k/a The Pawnee Public Schools (hereinafter Pawnee School), Motion To Remand.

On May 5, 1992, Pawnee School filed a state claim (abuse of process) action against the parent of several former Pawnee Public School students, alleging the parent engaged in a pattern of harassment and intimidation against Pawnee School and its employees under the guise of seeking a due process hearing pursuant to §1415 of the Education of the Handicapped Act.[1] Pawnee School alleged the parent, Defendant Debra Eaves (Eaves), delayed the due process hearing which had been initially requested by Eaves, failed to cooperate with the due process hearing examiner and refused to provide information requested under the due process hearing. Pawnee School seeks "damages in excess of $3500 for attorney fees, and

[1] 20 U.S.C. §1400 *et seq.*

costs in the defense of the due process hearing". Pawnee School also sought punitive damages based upon an allegation that Eaves had "abused the process of the Education of the Handicapped Act in every school district in which she has resided for the same purpose of intimidate(sic), and harassment".

On May 28, 1992, Eaves removed the action to this Court, citing 28 U.S.C. §1331 (federal question) as a jurisdictional basis. On July 2, 1992, Pawnee School filed its Motion To Remand, arguing no federal question exists and the Court therefore lacks subject matter jurisdiction.

A case is removable only if the Plaintiff's Petition establishes its removability. **Oklahoma Tax Commission v. Graham**, 109 S.Ct. 1519 (1989). The mere possibility of a federal issue or question is not sufficient. **Graham**, *supra*. The well-pleaded complaint can, in a proper case, defeat federal question jurisdiction. **Caterpillar Inc. v. Williams**, 107 S.Ct. 2425 (1987).

Defendant's Notice For Removal alleges Eaves "is entitled to remove this action inasmuch as the underlying action against her arises from an exercise by the defendant of a right established by the Laws of the United States, the exercise of which is guaranteed to said defendant by federal law and the Constitution of the United States of America, and further that the said State Court Action in retaliation for the exercise of a federally guaranteed right, also, gives rise to a cause of action in favor of the defendant back against the said plaintiff by way of counterclaim and cross-claims against third party defendants retaliating against the plaintiff

for exercising her rights and as next friend the rights of her minor children, which counterclaim and cross-claims against third party defendants, arise under federal law . . .". Eaves has filed no answer, counter-claim or cross-claim.

It is black-letter law that a removing party may not bootstrap federal question jurisdiction through the medium of an answer, counterclaim or cross-claim. Essentially, federal question jurisdiction, for the purposes of removal, rises and falls upon the allegations of the state court petition. **Graham**, *supra*.

In the instant case Pawnee School's Petition does reference a federal act, the Education of the Handicapped Act (EHA). However, it does not allege a cause of action against Eaves under that act. Rather, Pawnee School alleges that Eaves, under the guise of exercising her rights (and those of her children) under such act abused the legal process to the considerable damage and expense of Pawnee School. However, Pawnee School seeks no federal based claim.

Abuse of process is a state claim which, had Pawnee School alleged a (federal jurisdiction) claim under EHA, would have been appropriately characterized as a pendent state claim. In that instance the abuse of process claim would have piggy-backed the federal claim under the recently enacted Supplemental Jurisdiction provisions found in 28 U.S.C. §1367 *et seq*.

Pawnee School has brought an action, under a tort theory, for recovery of its alleged losses based upon Eaves alleged abuse of

process conduct[2], which conduct Plaintiff claims arose during Eaves pursuit of rights under a federal disability statute. The Court concludes such state claim does not involve a federal question. Absent same, this Court has no subject matter jurisdiction.

The Court concludes Pawnee School's Motion To Remand should be granted and the same is hereby REMANDED to the District Court for Pawnee County, State of Oklahoma.

IT IS SO ORDERED this 8th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2] The Court, although not addressing the merits of the abuse of process claim, concludes Pawnee School has a heavy burden to establish its claim under this tort theory. Abuse of process, under Oklahoma cases, typically involves misuse of, for example, the garnishment process (General Supply Co. v. Pinnacle Drilling Fluids, Inc., 806 P.2d 71, 1991), the discovery process (Big Five Community Services, Inc. v. Billy Jack, et al, 782 P.2d 412, 1989), alleged process issued for an ulterior purpose (Tulsa Radiology Associates, Inc. v. Hickman, 683 P.2d 537 1984), and the like.

CLOSED

ENTERED ON DOCKET
DATE OCT 23 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	Case No. 84-01460-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff-Appellee,	
vs.	Adversary No. 86-765-C
MARY WIER and CAROLYN BULGER,	
Defendant-Appellants.	Dist. Ct. No. 92-C-622-E

FILED
OCT 22 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	Case No. 84-01460-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff-Appellee,	
vs.	Adversary No. 86-614-C
LOUISE E. LESTRO and JOSE LESTRO,	
Defendant-Appellants.	Dist. Ct. No. 92-C-613-E

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Rickey W. Spears,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant.

Case No. 91-C-351-B

ORDER

The Court has for its consideration the objections of Plaintiff, Rickey Spears, to the Report and Recommendation (hereinafter "R&R") of the United States Magistrate Judge affirming the Administrative Law Judge's (hereinafter "ALJ") denial of Social Security Disability Benefits and Supplemental Security Income Disability.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking review of the decision of the Secretary of Health and Human Services. The matter was referred to the Magistrate Judge who entered his R&R on July 9, 1992. The Magistrate Judge recommended to affirm the Secretary's decision.

The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

> "shall be determined to be under disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but

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> cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. §423(d) (2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once a disability is established, the burden shifts to the Secretary who must show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> "is not merely a quantitative exercise.

> Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, once the claimant has established a disability, the Secretary's denial of benefits must be supported by substantial evidence that the claimant could do other work activity in the national economy.

The Secretary has established a five-step process for evaluating a disability claim. The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, are as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

The inquiry begins with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry

ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

Plaintiff here allegedly suffers from knee, back, and foot problems. The present appeal focuses on 1) whether substantial evidence supported the finding of the ALJ; 2) whether improper hypothetical questions were asked by the ALJ to the vocational expert witness which provided the basis for the ALJ's denial of benefits; 3) whether the ALJ failed to develop the case for this pro se plaintiff.

Substantial Evidence

Based on the testimony of the Plaintiff and the medical reports, the ALJ found that Plaintiff's impairments did not meet the strictures of 20 C.F.R. § 404, subpt. P, app. 1, as he failed to satisfy the second section of the test as set forth in Reyes. The ALJ concluded that Plaintiff does not have an impairment or combination of impairments of such severity as to prevent him from engaging in all substantial gainful work activity, including Plaintiff's past relevant work as night watchman, truck driver and production line welder.

Plaintiff objects that there is not substantial evidence to support this finding. During the May 11, 1990, hearing before the ALJ, Plaintiff testified that his knee is unstable, and his whole leg is weak, and that he constantly has annoying pain. He stated that in 1988 he fell off a bridge and broke his right ankle. Plaintiff continued that his leg muscles quiver and that while he can lift a battery only weighing 10-15 pounds, he cannot carry the battery. If he squats, his lower back hurts. Finally, he once

walked four miles and then experienced pain for two days; however, he can walk one mile with a lengthy rest.

Plaintiff testified that he is not on any prescribed medication but that he takes a couple of aspirin as needed for an occasional headache. Plaintiff performs no rehabilitative exercises.

Plaintiff continued that he can stand for four hours and can sit for two hours. Plaintiff can climb two flights of stairs, drive a car from Tulsa to Oklahoma City with two stops, read and write and visit a female neighbor across the street every morning for three to four hours. Plaintiff plays pool at his brother's store and makes daily bank deposits for him. Plaintiff prepares his own meals, engages in regular personal hygiene, washes his own clothes, and has gone on a fishing trip.

In addition to relying upon the testimony of the Plaintiff, the ALJ reviewed the medical records of Plaintiff's treating physician and other doctors and found as follows:

Initially, Plaintiff's physician, Dr. Richard Loy, who treated Plaintiff four times since the May 1985 injury, found that Plaintiff demonstrated no lost motion to the back and that the knee was essentially normal. He did, however, indicate tenderness in the lower sacrum (tailbone) and paresthesia[1] of the medial calf.

Dr. Loy reaffirmed this diagnosis on November 15, 1985, noting that an arthroscopy had been performed. Examination of the knee revealed rather marked instability of ligaments and the probability

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[1] A condition of organic tissue causing it to function at abnormal intervals. Dorland's Medical Dictionary (27th ed.1988).

that additional surgery to Plaintiff's knee and back would be necessary.

December 26, 1985, Plaintiff was examined by Dr. J. Patrick Livingston, a physician who appears to have entered into this case on an initial workman's compensation claim. Dr. Livingston's examination revealed a "straightforward, healthy appearing young white male in no obvious distress". Dr. Livingston concluded that Plaintiff's continued complaints were more than likely related to continued arthritis of the knee joint; and, that there may simply be nothing more that can be done.

April 7, 1986, Dr. Livingston, upon receiving the results of a myelogram and CT scan, found Plaintiff's lower extremities were negative for any abnormalities including radiculopathy, polyneuropathies, or myopathic precesses.[2] He wrote that with proper medical and exercise therapy, Plaintiff could extend use of his back and that a type of knee brace would prevent knee collapse.

February 29, 1988, Plaintiff was seen in an emergency room by Dr. Emil Milo, who treated Plaintiff nine or ten times due to an ankle injury. Dr. Milo stated in a letter that Plaintiff would have stiffness, degenerative arthritic changes and more or less chronic pain in his joint which will restrict his activities, especially prolonged standing, walking, or carrying heavy weights. While Tylos was prescribed, Dr. Milo emphasized that Plaintiff should cut down on pain medication, by underlining such in his

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[2] Disease of the nerve roots, a disease of several nerves, or any disease of the muscle. Dorland's, Id.

letter.

Finally, on October 30, 1989, Dr. Arther Woodcock diagnosed Plaintiff with lower back pain syndrome. However, he stated in his examination that Plaintiff could move his legs, feet and back well enough to do most jobs. Two other doctors, Dr. Diana Hardene and Dr. Charles Harris, confirmed Plaintiff's low back pain syndrome, but also noted that Plaintiff could sit, walk and stand well.

Based on the foregoing, the record and his own observations, the ALJ concluded that Plaintiff was not disabled under the Social Security Act. The Magistrate Judge found that substantial evidence supported the ALJ's ruling. This Court agrees with and adopts the recommendation of the Magistrate Judge.

Hypothetical Questions by the ALJ

Plaintiff argues that a hypothetical question asked by the ALJ to the vocational expert, during the administrative hearing, was incomplete and not sufficient to deny benefits to the plaintiff.

The hypothetical question posed by the ALJ was only part of the evidence relied upon by the ALJ in making his ruling. A combination of four types of evidence, all of which have been presented in this case, may satisfy the substantial evidence requirement: (1) objective medical facts; (2) medical opinions; (3) subjective evidence of pain and disability; (4) the claimant's age, education and work experience. Ward v. Harris, 515 F. Supp. 859 (W.D. Okla. 1981).

Vocational experts may determine and give testimony as to whether claimants have earlier acquired skills which would transfer to another category of work. Hargis v. Sullivan, 945 F.2d 1482,

1492 (10th Cir. 1991). Such testimony in disability determination proceedings typically includes, and is often centered upon one or more hypothetical questions. Podedworny v. Harris, 745 F.2d 210 (3rd Cir. 1984); Brown v. Bowen, 801 F.2d at 362. The examiner, sitting as a trier of fact, may apply his experience and judgment in weighing the testimony of experts and draw fair and reasonable conclusions from the evidence. Warner v. Califano, 623 F.2d 531 (8th Cir. 1980), reaffirming Johnson v. Richardson, 486 F.2d 1023 (8th Cir.1973).

Hypothetical questions posed to vocational experts must sufficiently relate the claimant's particular physical and mental impairments. Hargis, 945 F.2d at 1492. Otherwise, a response to an inadequate hypothetical is not substantial evidence sufficient to support the ALJ's decision. Id. The Tenth Circuit has found, however, that the ALJ need only set forth those physical and mental impairments accepted as true by the ALJ, and the question will be improper only if it was clearly deficient. Brown v. Bowen, 801 F.2d at 363.

In the present case, the record shows that the hypothetical question referenced Plaintiff's impairments as follows: "no prolonged walking, climbing, stooping or squatting." In arguing that the hypothetical question is incomplete, Plaintiff states that the question should have included more specific listings of jobs, pain and individualized specific hours as to when Plaintiff could sit, walk and stand.

The Magistrate Judge found that based on the medical evidence together with the Plaintiff's own testimony, the hypothetical posed

to the vocational expert listing the specific impairments as "no prolonged walking, bending, climbing, stooping or squatting", specifically stated Plaintiff's condition. The Court agrees with and adopts the finding of the Magistrate Judge.

Pro se Plaintiff

Social Security hearings are subject to procedural due process. Richardson v. Perales, 402 U.S. at 401. Where the claimant is unrepresented, the ALJ should assume a more active role, which creates a heightened duty of care and responsibility. Livingston, 614 F.2d 342, 345 (3rd Cir. 1980) (the claimant was unable to and did not cross-examine the vocational expert).

The ALJ should, as a matter of courtesy and fairness, ask an unrepresented claimant if he has any questions to ask the witness. Figueroa v. Secretary of HEW, 585 F.2d 551, 554 (1st Cir. 1978). In the present case, the ALJ provided Plaintiff with this opportunity and the Plaintiff asked the vocational expert a number of questions. Additionally, the ALJ corrected the vocational expert where she made inaccurate statements regarding previous job descriptions of Plaintiff. The ALJ also questioned the vocational expert as discussed above.

Plaintiff was advised of his right to an attorney and knowingly waived that right.[3] The fact that Plaintiff was

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[3] ALJ: ...You do have the right to assistance of counsel. As, as is the case with most rights, you have the right to waive that right and to proceed with the hearing without any assistance. What is your desire this morning.

CLMT: Not to have an attorney. I was told I didn't need one.

ALJ: Okay, very well. We'll proceed on that basis, and if you change your mind, for any reason, let me know. We'll stop the hearing at that point.

unrepresented by counsel and knowingly waived this right will not alone be sufficient for remand. Hess v. Secretary of HEW, 497 F.2d 837 (3rd Cir. 1974). The Court agrees with and adopts the finding of the Magistrate that the ALJ complied with his heightened duty to develop testimony for the pro se claimant and that he made a substantial inquiry of the vocational expert.

The ALJ's denial of Social Security Disability Benefits and Supplemental Security Income Disability is hereby AFFIRMED.

IT IS SO ORDERED this 20th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLMT: Okay.
[Transcript of Hearing, p. 24].

CLOSED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHERYL LEIGH REEDER,
Plaintiff,

vs.

No. 90-C-1000-C

GENERAL MOTORS CORPORATION,
a foreign corporation,
Defendant

JUDGMENT

This matter came on for jury trial on the 23rd of September, 1992. Plaintiff presented her case and rested and the Defendant proceeded presenting its case, resting on the 26th of September, 1992. The jury deliberated and on the 26th of September, 1992, the jury found in favor of Defendant and against the Plaintiff.

WHEREBY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered on behalf of Defendant and against the Plaintiff and that reasonable costs be granted to the Defendant.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ROBERT M.N. PALMER

MARY QUINN-COOPER

ROD LOOMER

118

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 22 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

MAJOR BOB MUSIC, TEN TEN TUNES, MATTIE RUTH MUSICK, SEVENTH SON MUSIC, INC. AND POLYGRAM INTERNATIONAL PUBLISHING, INC.,

Plaintiffs,

vs.

LARRY AKIN AND PATRICIA F. JOHNSON,

Defendants.

NO. 92-C-237-E

ENTERED ON DOCKET
DATE OCT 23 1992

SUPPLEMENTAL JUDGMENT

The above-styled and numbered cause comes before this Court pursuant to plaintiffs' timely Application for Supplemental Judgment for Attorney's Fees. After review of the plaintiffs' Application and the attached Affidavit of plaintiffs' counsel, and being fully advised in the premises, the Court finds that the plaintiffs' Application should be, and the same hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded a Supplemental Judgment against defendants Larry Akin and Patricia F. Johnson, jointly and severally, for plaintiffs' attorney fee in the amount of $ 1,310 .

IT IS SO ORDERED this 22nd day of October, 1992.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 22 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

LOUIS WILLIAM BRINLEE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-C-407-E
	)	
EMCASCO INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT 23 1992

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW ON this 22nd day of Oct, 1992, it appearing to the Court that the subject matter of this lawsuit is currently pending in the District Court in and for Tulsa County, State of Oklahoma, this case is herewith dismissed without prejudice.

JAMES O. ELLISON

United States District Judge

MWM/kav/156-84

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	Case No. 84-01460-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff-Appellee,	
vs.	Adversary No. 86-478-C
B. N. ROLFE and GENE ROLFE,	
Defendant-Appellants.	Dist. Ct. No. 92-C-549-E

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

ENTERED ON DOCKET
DATE OCT 23 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	Case No. 84-01460-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff,	
vs.	Adversary No. 86-375-C
MARTHA LEE VANDEVER,	
Defendant.	Dist. Ct. No. 92-C-547-E

FILED

OCT 22 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22d day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

15

CLOSED

ENTERED ON DOCKET
DATE OCT 23 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation,	Case No. 84-01460-W (Chapter 11)
Debtor.	
R. DOBIE LANGENKAMP, Successor Trustee,	
Plaintiff-Appellee,	
vs.	Adversary No. 86-596-C
J. D. ROLFE and LISA ROLFE,	
Defendant-Appellants.	Dist. Ct. No. 92-C-612-E

FILED

OCT 22 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22d day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

ENTERED ON DOCKET
DATE OCT 23 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY, an Oklahoma trust company, also d/b/a Western Trust and Savings Company,

Debtor.

R. DOBIE LANGENKAMP, Successor Trustee,

Plaintiff-Appellee,

vs.

RICHARD A. WOLFENBARGER, DAISY WOLFENBARGER,

Defendant-Appellants.

Case No. 84-01461-W
(Chapter 11)

FILED
OCT 22 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Adversary No. 86-583-C

Dist. Ct. No. 92-C-611-E

O R D E R

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(11) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 22nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

15

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Donald F. Gill,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant.

Case No. 91-C-301-B

ENTERED 10/22/92

ORDER

The Court has for its consideration the objections of Plaintiff, Donald Gill, to the Report and Recommendation (hereinafter "R&R") of the United States Magistrate Judge affirming the Administrative Law Judge's (hereinafter "ALJ") denial of Social Security Disability Benefits.

Plaintiff filed the instant action pursuant to 42 U.S.C. § 405(g) seeking review of the decision of the Secretary of Health and Human Services. The matter was referred to the Magistrate Judge who entered his R&R on July 6, 1992. The Magistrate Judge recommended to affirm the Secretary's decision.

The Social Security Act entitles every individual who "is under a disability" to disability insurance benefits. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

> "shall be determined to be under disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the

> national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. §423(d) (2)(A).

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once a disability is established, the burden shifts to the Secretary who must show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. See Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> "is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered

> by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, once the claimant has established a disability, the Secretary's denial of benefits must be supported by substantial evidence that the claimant could do other work activity in the national economy.

The Secretary has established a five-step process for evaluating a disability claim. The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, are as follows:

> (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
>
> (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
>
> (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
>
> (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
>
> (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

The inquiry begins with step one, and if at any point the claimant is found to be disabled or not disabled, the inquiry ceases. Reyes, 845 F.2d at 242; Talbot v. Heckler, 814 F.2d 1456,

1460 (10th Cir. 1987); 20 C.F.R. §416.920 (1991).

In this case, Plaintiff allegedly suffers from severe hip and lower back pain, and has suffered a heart attack. The present appeal focuses on 1) whether substantial evidence supported the finding of the ALJ; 2) whether the ALJ failed to adequately inform the plaintiff of his right to counsel; 3) whether the ALJ failed to develop the case for this pro se plaintiff; 4) whether the ALJ erred in his development of the plaintiff's claim of disabling pain.

Substantial Evidence

Based on the testimony of the Plaintiff and the medical reports, the ALJ found that Plaintiff's impairments did not meet the strictures of 20 C.F.R. § 404, subpt. P, app. 1 as he failed to satisfy the fourth step of the sequential evaluation. The ALJ concluded that Plaintiff does not have an impairment or combination of impairments of such severity so as to prevent him from engaging in all substantial gainful work activity, including Plaintiff's past relevant work as an electronics mechanic repairing navigational instruments for airplanes. He found that plaintiff had the residual functional capacity to perform work-related activities, except for work involving frequently lifting and carrying of more than 25 pounds and occasional lifting and carrying of more than 50 pounds. The ALJ also concluded that Plaintiff's past relevant work did not require performance of work-related activities precluded by these limitations.

Plaintiff objects that there is not substantial evidence to support this finding. The Court has thoroughly reviewed the

medical records and testimony and finds substantial evidence in the record to support the ALJ's finding that Plaintiff is not disabled. The Court further incorporates by reference the R&R of the Magistrate Judge setting forth the testimony and medical records relied upon by the ALJ.

Right to Counsel

Plaintiff next contends that he was not sufficiently advised of his right to an attorney. Plaintiff was informed of his right to representation in the Notice of Hearing. Where so informed, the hearing examiner is not required to re-advise the claimant of his right to be represented by an attorney. Garcia v. Califano, 625 F.2d 354, 355 (10th Cir. 1980). Nevertheless, Plaintiff was further advised of his right to an attorney and knowingly waived that right at the onset of the hearing.[1]

---

[1] ALJ: ... At the time you made your request for the hearing and also in the notice that I sent you concerning the time and place of the hearing you were advised you have the right to have an Attorney or Representative appear with you to help you in presenting your claim. Since you appear with your wife, I assume, you want to waive that right and go ahead with the hearing, is that correct?

CLMT: For the Attorney, you mean?

ALJ: Yeah, um-hum.

CLMT: Well, yes. I really couldn't afford an Attorney is the reason why I didn't get one.

ALJ: Well, of course, they have legal aid and other services available to help you if you, if you feel that you want--

CLMT: Well--

ALJ: --an Attorney to go--

CLMT: --in my disability, what I draw in disability disqualifies me from getting from legal aid. I mean, I, I'm between -- I draw just enough to not be eligible for that and not enough to meet all my living expenses. I'm right in between and that's --

ALJ: Do you want to go ahead then with the hearing?

CLMT: I--yes, sir, I guess. It--

ALJ: Well, it's up to you.

CLMT: Well, yes, I'm, I'm ready, I haven't--

The fact that Plaintiff was unrepresented by counsel and knowingly waived this right will not alone be sufficient for remand. Hess v. Secretary of HEW, 497 F.2d 837 (3rd Cir. 1974).

Pro Se Plaintiff

Social Security hearings are subject to procedural due process. Richardson v. Perales, 402 U.S. at 401. Where the claimant is unrepresented, the ALJ should assume a more active role, which creates a heightened duty of care and responsibility. Livingston, 614 F.2d 342, 345 (3rd Cir. 1980) (the claimant was unable to and did not cross-examine the vocational expert).

The ALJ should, as a matter of courtesy and fairness, ask an unrepresented claimant if he has any questions to ask the witness. Figueroa v. Secretary of HEW, 585 F.2d 551, 554 (1st Cir. 1978). In the present case, the ALJ provided Plaintiff with this opportunity. After a review of the record, the Court further finds that the ALJ afforded the claimant a full and fair hearing.

Subjective Pain

Plaintiff also contends that the ALJ failed to properly develop his claim of disabling pain. The Tenth Circuit has said that subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings. Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). "To establish disabling pain without the explicit confirmation of treating physicians may be difficult. Nonetheless, the claimant is entitled to have his nonmedical objective and subjective testimony

---

ALJ: Okay.

of pain evaluated by the ALJ and weighed alongside the medical evidence." Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The standard for evaluating claimant's objective complaints of pain requires that the examiner consider such factors as a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, dosage and effectiveness of medications, regular contact with a doctor, the claimant's activities, and all evidence relating to the extent of the pain in the particular plaintiff. Luna v. Brown, 834 F.2d 161 (10th Cir. 1987).

The ALJ made the determination based on all the relevant factors that Plaintiff's pain is not disabling under the Act. This judgment is binding on the district court if there is no substantial probative evidence to support otherwise. See Richardson v. Perales, 402 U.S. at 399; Broadbent v. Harris, 698 F.2d 407, 413 (10th Cir. 1983).

After reviewing the record, the Court agrees with and adopts the R&R of the Magistrate Judge, finding the ALJ properly evaluated the Plaintiff's claim of disabling pain. The Court further incorporates by reference the R&R as it relates to the issue of pain.

The ALJ's denial of Social Security Disability Benefits is hereby AFFIRMED.

IT IS SO ORDERED this 21 day of October, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIFFANY PRUITT and ANTHONY PRUITT, individually and as Parents and Next Friends of KEWON MAURICE PRUITT, Deceased,

Plaintiffs,

vs.

THE WELSH COMPANY and ARMSTRONG WORLD INDUSTRIES, INC.,

Defendants.

No. 92-C-541-B

ORDER SUSTAINING MOTION FOR PARTIAL SUMMARY JUDGMENT

The Motions for Partial Summary Judgment of the Defendants, The Welsh Company and Armstrong World Industries, Inc., pursuant to Fed.R.Civ.P. 56 are before the Court for decision. Defendants assert as a matter of law that Plaintiffs' alleged fourth and fifth causes of action for breach of warranty of fitness and breach of warranty of merchantability are subject to a motion to dismiss because Plaintiffs had no standing to assert such theories of recovery.

The undisputed material facts establish that the alleged offending product, the crib frame, was obtained by Plaintiffs from Infant Services of the Oklahoma Welfare Department as either a gift or loan. The Plaintiffs admittedly did not purchase the subject crib frame or pay any monetary consideration for it.

Neither the Oklahoma Statutes nor case law interpretations extend a breach of warranty of fitness or a breach of warranty of merchantability claim to the Plaintiffs under the undisputed

material facts herein. Okla.Stat. tit. 12A, §2-103(1)(a) and Okla.Stat. tit. 12A, §2-318; Hester v. Purex Corporation Limited, 534 P.2d 1306, 1308 (Okla. 1975); Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974); and Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okla. 1990).

Therefore, Defendants' motion for partial summary judgment is hereby SUSTAINED regarding Plaintiffs' alleged fourth and fifth causes of action for alleged breach of warranty of fitness and alleged breach of warranty of merchantability.

The case will proceed on the following schedule:

November 13, 1992	Exchange names and addresses of all witnesses, including experts, in writing, along with a brief statement regarding each witness' expected testimony (not necessary if witness' deposition taken)
December 4, 1992	Discovery cutoff
January 4, 1993	File agreed pretrial order and exchange all premarked exhibits
January 11, 1993	File requested voir dire, requested instructions, any trial brief a party wishes to file, or motions *in limine*
January 19, 1993	Jury trial at 9:30 A.M.

DATED this 16th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MERCEDES-BENZ CREDIT CORP.,

Plaintiff(s),

vs.

TRUCK CENTER OF TULSA, INC., and TROY MILES,

Defendant(s).

No. 91-C-979-B

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 19th day of October, 1992.

United States District Judge
THOMAS R. BRETT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM K. McCABE)
Plaintiff,)
)
vs.) No. 92-C-23-E
)
JOHN F. CANTRELL, et.al.)
Defendant.)

O R D E R

The Court has for consideration the joint motion of the parties for a dismissal of the action without prejudice (docket no. 23). The Court finds the motion should be granted and it is SO ORDERED this 21st day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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CLOSED

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT 20 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LONNIE STOGSDILL,

Plaintiff,

vs.

J-M FARMS, INC.

Defendant.

Case No. 92-C-117-E

ENTERED ON DOCKET

DATE OCT 21 1992

ORDER

NOW on this 20 day of October, 1992, pursuant to the Joint Stipulation For Dismissal filed by the parties, it is hereby ORDERED, ADJUDGED AND DECREED that all claims and causes of action filed in this case are hereby dismissed with prejudice, with all parties to bear their own costs, attorneys' fees and expenses.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

200.92B.NEV

CLOSED

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 20 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KATHERINE GOODWIN,

Defendant.

Civil Action No. 92-C-604-E

ENTERED ON DOCKET
OCT 21 1992
DATE

DEFAULT JUDGMENT

This matter comes on for consideration this 20 day of October, 1992, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, KATHERINE GOODWIN, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, KATHERINE GOODWIN, was served with Summons and Complaint on August 17, 1992. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, KATHERINE GOODWIN, for the principal amount of $2,022.60, plus accrued interest of $747.46 as of October 15, 1992, plus interest thereafter at the rate of 9 percent per annum until judgment, plus

costs in the amount of $87.00, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.13 percent per annum until paid, plus costs of this action.

[illegible] ELLISON

United States District Judge

Submitted By:

KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463